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RECORD, CASE No. 14,263.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 248.

THOMAS C. McKITTRICK, APPELLANT,

vs.

THE ARKANSAS CENTRAL RAILWAY COMPANY, THE ARKANSAS MIDLAND RAILROAD COMPANY, AND THE UNION TRUST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 13, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 15, 1893.

1 Be it remembered that on the tenth day of January, 1883, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas Thomas C. McKittrick, by N. and J. Erb, Esqs., his solicitors, and filed therein, on the chancery side of said court, a bill of complaint against the Arkansas Midland Railroad Company *et al.*; which bill is in the words and figures following:

2 In the Circuit Court of the United States for the Eastern District of Arkansas. In Equity.

To the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, in the eighth judicial circuit, sitting in equity:

Thomas C. McKittrick, a subject and citizen of the United Kingdom of Great Britain, on behalf of himself and all holders of bonds issued by the State of Arkansas to the Arkansas Central Railway Company under the provisions of an act of the General Assembly of said State entitled "An act to aid in the construction of railroads," approved July 21st, 1868, and to which bonds reference is hereinafter made, who desire to become parties to this suit and contribute to the expenses thereof, brings this his bill against the Arkansas Central Railway Company, a railroad corporation created and organized under and by virtue of the laws of the State of Arkansas and a citizen thereof; the Arkansas Midland Railroad Company, a railroad corporation likewise created and organized under the laws of said State and a citizen thereof, and the Union Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York and a citizen thereof, all defendants.

And thereupon your orator states that it was and is provided by section six of article ten of the constitution of the State of Arkansas in force in year 1868 that "the credit of the State or counties shall never be loaned for any purpose without the consent of the people, expressed through the ballot-box;" that for the purpose of loaning the credit of the State and in order to encourage the building of railroads therein the General Assembly of the State of Arkansas passed an act entitled "An act to aid in the construction of railroads," which said act was signed and approved by the governor of said State on the 21st day of July, 1868.

That it is provided by said act, in the first section thereof, as follows:

"For the purpose of securing such lines of railroad in this State as the interests of the people may from time to time require, the faith and credit of the State of Arkansas *is* hereby irrevocably pledged, and the proper authorities of the State will and shall issue to each railroad company or corporation which shall become entitled thereto the bonds of the State in the sum of one thousand dollars each, payable in thirty years from the date thereof, with coupons thereto attached for the payment of interest on the same, in the city of New York, semi-annually, at seven per cent. per annum,

in the sum of fifteen thousand dollars in bonds for each mile of railroad which has not received a railroad land grant from the United States, and ten thousand dollars in bonds for each mile of railroad which has received a land grant from the United States."

That in pursuance of the provisions of the act aforesaid the people of said State did, at an election holden at the time in said act required, to wit, on the third day of November, A. D. 1868, vote upon the proposition submitted by said act, and a majority of the votes cast at said election were in favor thereof and voted "for railroad," as in said act provided.

That by the second section of said act of July 21st, A. D. 1868, it was made the duty of the board of railroad commissioners to receive application for the loan of the credit of said State from railroad companies, to describe the same, and designate the railroad companies entitled thereto.

3 That under the fourth section of said act it was and is provided that any railroad company having existence under the laws of said State and desiring to receive the State aid referred to in said act might signify the same by application to the board of railroad commissioners, signed by its president and attested by the seal of the said corporation, setting forth the character and organization of said railroad company, its capital stock, a map of the line or lines of road proposed to be built, the progress made thereon, the financial condition and resources of such company, with such other information as the case may require, and if said board of railroad commissioners shall find such corporation to be organized according to law, with resources adequate to the purpose, and that the construction of the proposed line or lines of road will be of public benefit, and said board of railroad commissioners shall consent to approve and grant such application, then and thereafter the said railroad company or corporation shall be entitled to and have a right to ask for and receive the bonds of the State in said act mentioned, declared to be pledged and granted upon its complying with the fifth section of said act.

That the president of the Arkansas Central Railway Company (a corporation which had not received a land grant from the United States), in the manner prescribed by said act of July 21, 1868, applied to said board of railroad commissioners for a loan of the credit and bonds of the State of Arkansas, as provided in the act aforesaid, and on the 25th day of April, A. D. 1870, the said board of railroad commissioners took up the application of said Arkansas Central Railway Company and awarded the aid in said act mentioned and described to it for a distance of one hundred and fifty miles and at the rate of fifteen thousand dollars per mile and caused notice thereof to be given to said railway company.

That said Arkansas Central Railway Company was duly created and organized and authorized to construct, maintain, and operate a railroad from the city of Helena, in the county of Phillips, through the counties of Phillips, Monroe, Arkansas, Prairie, and Pulaski, to the city of Little Rock, in said last-named county, all in the State of Arkansas, said line so located, exclusive of side tracks, being one

hundred miles in length; and also a branch railroad from a point on its main line at or near Aberdeen to the city of Pine Bluff, in the county of Jefferson.

That on said last-mentioned date, upon proof required being made by said railroad company and its officers to the governor of the State and filed in the office of the secretary of state, the governor aforesaid issued and delivered and caused to be issued and delivered, on the award of the loan of the credit of said State, unto said Arkansas Central Railway Company one hundred and fifty bonds of one thousand dollars each, of the character, kind, and description hereinafter set out and described, numbered from one to one hundred and fifty, both inclusive.

That thereafter from time to time, at the dates hereinafter mentioned, on proof as by said act required, said board of commissioners issued and delivered or caused to be issued and delivered by the proper officers to said railway company like bonds of like denomination as follows, to wit:

On April 25th, 1871, the sum of.....	
On July 19th, 1871, the sum of.....	$150,000
On September 26th, 1871, the sum of	150,000
On November 6th, 1871, the sum of.....	150,000
On January 9th, 1872, the sum of.....	150,000
On July 30th, 1872, the sum of.....	150,000
On September 25th, 1872, the sum of	150,000
On February 21st, 1873, the sum of.....	150,000
On July 12th, 1873, the sum of.....	150,000

4 Being in all an issue and delivery, as aforesaid, of thirteen hundred and fifty bonds of one thousand dollars each, numbered from one to 1350, inclusive; all of which said bonds so issued and delivered as aforesaid, save as to number and date, are as follows, to wit:

No. —.		No. —.
$1,000.	UNITED STATES OF AMERICA.	$1,000.

It is hereby certified that the State of Arkansas is indebted unto the Arkansas Central Railway Company or bearer in the sum of one thousand dollars, lawful money of the United States of America, redeemable, at the city of New York, thirty years from the date hereof, with interest at the rate of seven per cent. per annum, payable semi-annually, at the city of New York, on the first day of April and October in each year, on the presentation of the proper coupons hereto annexed. The faith and credit of the State are hereby solemnly and irrevocably pledged for the payment of the interest and the redemption of the principal of this bond, issued in pursuance of an act of the General Assembly of the State of Arkansas, approved July 21st, 1868, entitled "An act to aid in the construction of railroads," the said act having been submitted to and duly ratified by the people of the State at the general election held on November 3rd, 1868.

In witness whereof the governor of the State has signed this bond, the State treasurer has countersigned the same, and the seal of the State has been affixed, at the city of Little Rock, Arkansas, this first day of April, 1870.

[SEAL OF STATE.]

——— ———, *Governor.*
——— ———, *Auditor.*

——— ———,
Secretary of State.
——— ———, *Treasurer.*

Each of said bonds at the time of their issue had sixty interest coupons thereto attached, numbered from one to sixty, both inclusive, and, with the exception of the time of payment and number thereon, are as follows, to wit:

$35.00. The treasurer of the State of Arkansas $35.00.

A. C. Ry. | Will pay to the bearer thirty-five dollars, in the city of New York, on the first day of October, 1871, being semi-annual interest due on bond No. —.

J. R. BERRY, *Auditor.*

Your orator shows that the said Arkansas Central Railway Company, on delivery of the said bonds to it, by proper authority caused and authorized its president, under his signature as such, to endorse upon each and every of said bonds a special guaranty, which was in words as follows, to wit:

"*Special Guarantee by the Arkansas Central Railway Company.*

"For a valuable consideration the Arkansas Central Railway Company hereby guarantee to the holder of the within bond the payment of the principal thereof when due and of the interest thereon as the same accrues by the State of Arkansas; and on default of said State of Arkansas to pay such principal or interest or either as the same shall become due the Arkansas Central Railway Company agree to pay the same to said holder upon the delivery of the within bond or of the coupon for the interest thereon upon which a default of payment shall have been made.

THE ARKANSAS CENTRAL RAILWAY COMPANY.
By S. W. DORSEY, *President.*

5 Your orator states that under the seventh section of the act hereinbefore referred to that the legislature shall from time to time impose upon each railroad company to which bonds shall have been issued a tax equal to the amount of the annual interest upon such bonds then outstanding and unpaid, and after the expiration of five years from the completion of said road the legislature shall impose an additional special tax of two and one-half per cent. per annum upon the whole amount of State aid granted to such company, and that the taxation in said section mentioned

should continue until the amount of bonds issued to such company, with the interest thereon, shall have been paid by said company, in which case the said railroad shall be entitled to a discharge from all claims or liens on the part of the State. Your orator states that the Arkansas Central Railway Company has not discharged said lien by said act provided, nor has it been discharged by any one else for or on its behalf; that it was further provided by the eighth section of said act that in case said company shall fail to pay the taxes imposed by the seventh section of said act at the time the same becomes due and for sixty days thereafter it shall be the duty of the treasurer of State by a writ of sequestration to seize and take possession of the income and revenues of said company until the amount of said defaults shall be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall release the further revenues of said company to its proper officers; that before the award of the loan of the credit of the State and at the first assembling of the legislature after the said election at which the act of July 21st, 1868, was voted upon and ratified by the people of said State at the election held November 3rd, 1868, and before the issuance of any bond thereunder to said railway company, the General Assembly of the State of Arkansas passed an act the purpose and object of which was more specifically to provide for the prompt payment of the interest upon the bonds which it might thereafter issue to railroad companies, which said last-mentioned act is entitled "An act to provide for paying the interest on the bonds issued to aid in the construction of railroads," which act was approved by the governor on April 10th, 1869; that it is provided — said last-mentioned act that the auditor of State shall on or before the first of June in each year certify to the treasurer of the State the amount of bonds issued to each railroad company and the amount of semi-annual interest that will accrue thereon—that is to say, the amount of interest the State will have to pay on the first day of October of that year on the bonds issued to each railroad company and the amount of tax required from each of said railroad companies to pay the same, which tax shall be deemed due and payable on the thirtieth day of June of that year; that the auditor shall in like manner, on or before the first day of December in each year, certify to the treasurer of the State the amount of semi-annual interest which the State will have to pay on the said bonds on the first day of April in the ensuing year issued under said act of 1868 and the amount of the tax required from each railroad company to pay the same, and which tax shall be deemed due and payable on the 31st day of December of that year; that the treasurer, upon the receipt of the auditor's certificate, shall cause notice to be served upon each railroad company on or before the twentieth day of June and December in each year specifying the amount of tax to be paid, which amount shall be the interest on said bonds for said period, and demanding the payment of the same into the treasury on the 30th day of June
6 and the 31st day of December, respectively, in conformity with the provisions of said act of July 21st, 1868, and said act of April 10th, 1869; that if at the expiration of sixty days after

said tax shall become due and payable said railroad company shall fail to make full payment of said tax, it shall be the duty of said treasurer, through the attorney general, to make and file a petition in the Pulaski chancery court setting forth the amount due and the fact of said default, praying the issue of the writ of sequestration contemplated in said act of July 21st, 1868, and the appointment of a receiver to receive the revenue and income of said company for the purpose specified in the act of July 21st, 1868; that upon the issue of said writ the receiver therein named shall take possession of all the incomes and revenue of said defaulting company, with authority to demand and receive all monies coming to the same upon the operation of said road of such defaulting company; that all officers of such company as may have defaulted shall pay all monies which they may have or come into the possession of by way of revenue or income or from operating said railroad over to said receiver; that said officers shall also submit all necessary books, papers, and accounts to said receiver for examination, and all moneys received by him after paying proper operating expenses shall be applied to the payment and discharge of the tax due and unpaid, and that such receivership shall continue until all amounts in default by such company shall be paid, with reasonable costs of sequestration, to be taxed and certified, and that when such payments have been made said receiver shall be discharged and withdrawn from the management of the affairs of such company. Your orator submits the acts aforesaid, to wit, that of July 21st, 1868, and April 10th, 1869, constitute the law of the contract in relation — said bonds, and the said acts, being public acts and recited in the body of said bonds, constitute and constituted notice to all persons dealing with the railroad aforesaid of the liens and remedies thereby created and constituted notice to subsequent purchasers and incumbrancers of the lien by said acts created. Your orator further submits that the special guaranty aforesaid, endorsed upon said bonds by the said Arkansas Central Railway Company, constituted a warranty that said bonds were duly and lawfully issued in pursuance of said acts and of the liens and remedies thereby created, and that the holder or holders thereof should be fully and amply protected by it in said liens and remedies, and that payment should and would be made in the manner in said act contemplated promptly at the times specified therein.

Your orator states that after the said application of said railway company for the loan of the credit of the State and the bonds aforesaid and after the award of the same thereto by the said board of railroad commissioners as aforesaid, to wit, on the 3rd day of July, A. D. 1871, the said railway company executed a mortgage or deed of trust to the Union Trust Company of New York, as trustee, to secure the payment of one million two hundred thousand dollars, evidenced by coupon bonds bearing interest at the rate of seven per centum per annum, in said mortgage or deed of trust specifically described, which embraced all the property and appurtenances of said railway company; that said mortgage or deed of trust was not filed for record or recorded in the county of Pulaski, in the recorder's office thereof,

until —— —, 1871, and was not filed for record in the other counties through which said railway was to be constructed, operated, and maintained until after said date; that under
7 said mortgage or deed of trust there were executed and delivered to said trustee one thousand of said bonds for the sum of one thousand dollars each, numbered from one to one thousand, both inclusive, and four hundred for the sum of five hundred dollars each, and numbered from one thousand and one to fourteen hundred, both inclusive. It was further in said mortgage or trust deed provided that none of said bonds should be deemed issued under said mortgage or in anywise entitled to the benefit or security thereof, or be in anywise obligatory upon said railway company, as an evidence of debt or otherwise, unless or until there should be endorsed thereon a certificate signed by the said Union Trust Company, a certificate signed by said trust company through its proper officer or its successor in trust, authenticating them as being duly and lawfully issued and secured. Your orator shows that of the said mortgage bonds there were signed and certified by said Union Trust Company and issued the amount of seven hundred and twenty thousand dollars.

That afterwards, to wit, on the — day of April, 1873, the said railway company cancelled and had destroyed the remaining bonds unissued, to wit, four hundred and eighty, of the denomination of one thousand dollars each, and on the same date executed and delivered to said Union Trust Company its second mortgage or deed of trust on the same property and appurtenances to secure the payment of nine hundred and sixty bonds, each for the sum of five hundred dollars, with interest coupons attached representing the interest to become due thereon semi-annually at the rate of seven per centum per annum. It was provided in said second mortgage or deed of trust that none of said bonds should be deemed issued under said mortgage or in anywise entitled to the benefit or security thereof, or be in anywise obligatory upon said railway company as an evidence of debt or otherwise, unless or until there should be endorsed thereon a certificate signed by said trust company, a certificate signed by it through its proper officer, authenticating them as being duly and lawfully issued and secured. Your orator shows that of said second-mortgage bonds there were issued, signed, and certified the amount of four hundred and eighty thousand dollars.

That on the 6th day of September, 1876, a suit was instituted in this honorable court, on the equity side thereof, in the Helena division, the number thereof being — and the style thereof being as follows: "Union Trust Company of New York *vs.* Arkansas Central Railway Co."

8 That among the allegations made in said bill of complaint by said trustee is the following, to wit:

"Twelfth. Your orator further shows that the State of Arkansas has or pretends to have some claim or lien on said railway and the other property of said Arkansas Central Railway Company so mortgaged to your orator as aforesaid, the particulars and nature of

which are unknown to your orator, and therefore your orator cannot more particularly state the same."

Your orator states that the prayer of said bill of complaint in relation to the bonds issued by the State of Arkansas to the said Arkansas Central Railway Company is as follows; to wit:

"Your orator prays that it may be ascertained and adjudged what, if any, estate or interest the State of Arkansas has in the said mortgaged property, and also whether the same is prior and superior to or subsequent and subject to the rights, estates, and interest of your orator under the two said several mortgages herein described."

Your orator alleges that neither the State of Arkansas, which cannot be sued, or any of the holders of the bonds issued by the State of Arkansas to the Arkansas Central Railway Company or the holders of coupons attached thereto were represented in or parties to said suit in which said Union Trust Company was complainant, nor was any decree therein rendered which in any manner determined the priority of said bonds or whether the lien of the State of Arkansas to and for the use and benefit of the holders of said State aid bonds was subordinate to in point of time or equity to that of the bonds issued under the mortgages aforesaid; all of will fully appear by reference to a copy of the decree rendered therein, hereto attached and prayed to be taken as a part hereof, marked "Exhibit A;" that in said suit the said railway company, after being duly served with the writ of subpœna, having failed to appear, answer, or demur to said bill of complaint, on the first day of January, 1877, a decree *pro confesso* was taken and entered in the cause, and thereafter, on March 17th, 1877, a final decree was therein taken and entered against said Arkansas Central Railway Company, and it was decreed, among other things, that the whole amount of bonds issued under said mortgage, with the interest thereon, were due; that unless the said defendant shall pay or cause to be paid to said complainant trust company, on or before a day certain therein named, the sum thereof, being the said principal and interest, with costs of suit, the said mortgages shall be foreclosed, and that the equity of redemption of said railway company shall henceforth be barred from all equity of redemption under said mortgage, and that in default of payment the mortgaged premises mentioned in the bill be sold; all of which will more fully appear by reference to a copy of said decree, hereto attached and made a part hereof, marked "Exhibit A."

That said defendant railway company did not pay the amount of said decree within the time therein limited, and on the 26th day of July, 1877, the mortgaged property aforesaid was sold by a master commissioner appointed by this honorable court for the sum of forty thousand dollars to S. H. Horner, as trustee, for certain uses hereinafter mentioned, who became the purchaser thereof, as trustee, at said sale. Your orator further shows that pending said foreclosure proceeding a receiver was appointed to take charge of said railway, its property and appurtenances, and that said receiver took charge of the same; that by authority of this honorable

court betterments were placed on said railway and prop-
9 erty acquired of the value of twenty-five thousand dollars or thereabouts; that said railway was then completed, equipped, and in operation for a distance of forty-eight miles and was worth upwards of four hundred thousand dollars; that on the 28th day of June, 1877, there was filed in said court and in said cause by the Lombard Syndicate (Limited), a corporation of England, by and through whom the said railway company had sold and negotiated many or all of the said State bonds issued to said Arkansas Central Railway Company and which was then the holder of some of said bonds, a notice and protest, which was in words as follows:

"*Protest.*

"We, the undersigned, having by public subscription offered and allotted the bonds of the State of Arkansas given in aid of the Arkansas Central railway and issued to this railway under the act of the State of 21st July, 1868, which issue was made on April 1st, 1870, therefore prior to the so-called first mortgage, bearing date July 3rd, 1871, and the above-mentioned bonds being endorsed by the railway as follows: 'Special guarantee endorsed by the railway company on each bond:' For a valuable consideration the Arkansas Central Railway Company hereby guarantee to the holder of the within bond the payment of the principal thereof when due and of the interest thereon as the same accrues by the State of Arkansas, and in default of said State of Arkansas to pay such principal or interest, or either, as the same shall become due, the Arkansas Central Railway Company agree to pay the same to said holder upon the delivery of the within bond or of the coupon for the interest thereon upon which a default in payment shall have been made.

"We, on our own behalf and in behalf of the holders of these bonds, hereby solemnly protest against the sale of this railway, as ordered by the court, except due provisions are made for the priority of the above issue, and hereby give notice to all purchasers or intended purchasers that they will buy the road subject to the above claims. This protest has been executed in triplicate, one of which has been forwarded to the registrar of the court to bring it to the notice of the court, one to the receiver, and the third to Messrs. Tappan and Horner, with a request to read it publicly at the time and place of sale.

"HENRY P. PRICE,

"*Secretary of the Lombard Syndicate (Limited), of June 1st,*

"1877, 3 *Circus Place, Finsbury, London, England.*

"Sealed by order and in the presence of—

"HENRY PERKINS PRICE." [SEAL.]

Your orator shows that said protest and notice were in fact received by said receiver before said foreclosure sale, as also by said Tappan and Horner, who read said notice and protest at and before said sale, in the presence of and in the hearing of said S. H. Horner and his alleged *cesti que trusts*. Your orator states that the General

Assembly of the State of Arkansas, not being mindful of the interest of your orator and the other holders of the bonds issued by said State to the Arkansas Central Railway Company, but with the intent to violate "the faith and credit of the State of Arkansas," which was "irrevocably pledged" by the act of July 21st, 1868, aforesaid, and to delay and embarrass your orator and all other holders
10 of said bonds issued by the State to said railway company, did on the 29th day of May, 1874, enact as follows, to wit:

"SECTION 1. That an act entitled 'An act to provide for paying the interest of bonds issued to aid in the construction of railroads, approved April 40th, 1869,' be, and the same is hereby, repealed."

That since the passage of said act the State of Arkansas, its officers, agents, and attorneys, have neglected and refused and now refuse to take any steps toward enforcing the payment of the interest on the said bonds issued to said Arkansas Central Railway Company.

Your orator further shows that by act of the General Assembly of the State of Arkansas approved January 20th, 1855, the Arkansas Midland Railroad Company was incorporated and authorized to construct a railroad from said city of Helena to said city of Little Rock. The charter authorized the company to make any lawful contract for *for* uniting its road with any other road having the same terminus or which might at any intermediate point approach the said railroad; that on the 8th day of March, 1869, there was filed in the office of the secretary of state, at Little Rock, under the general railroad incorporation law of said State, articles of association incorporating the Little Rock and Helena Railroad Company, the purpose of which was to construct a railroad from the city of Little Rock to said city of Helena; that on the 31st day of August, 1870, at a meeting of the board of directors of said Arkansas Midland Railroad Company, a resolution was adopted declaring that the said company be, and the same was thereby, consolidated with the said Little Rock and Helena Railroad Company under the name of "Arkansas Central Railway Company;" that at a meeting of the stockholders of the said Arkansas Midland Railroad Company and held on the 21st of September, 1870, it was unanimously resolved as follows:

"That the action of the board of directors of the company in changing the name of the road from the 'Arkansas Midland Railroad Company' to the Arkansas Central Railway Company be, and the same is hereby, confirmed."

That at a meeting of the directors of the Little Rock and Helena Railroad Company held on the 20th day of January, 1871, it was resolved as follows with respect to said consolidation:

"That we hereby agree to consolidate with said company under the name and style of the 'Arkansas Central Railway Company' and do hereby authorize and empower W. H. Rogers, the president of this company, to convey unto said Arkansas Central Railway Company all the rights, privileges, and immunities that we have or may have had or by any means may hereafter become entitled to under or by virtue of said organization, and after said conveyance made this company shall utterly cease to exist."

That the conveyance therein referred to was in fact made and the rights, privileges, and immunities of both companies were assumed, possessed, and controlled by the said Arkansas Central Railway Company, the president of the Arkansas Midland Railroad Company becoming president of the former company, which, thus formed and continued, is the defendant herein. Your orator shows that A. H. Johnson was the president of the said Arkansas Central Railway Company for a long time and up to and at the time of the foreclosure aforesaid, which he brought about; that he became the receiver of said road in said suit and for a long time acted as such; that he afterwards conspired with one W. W. Bailey and J. J. Horner to secure possession and control of
11 said railroad, of which forty-eight miles had been completed and *was* in operation, and to that end procured said Bailey to be appointed receiver in his place and stead, but all the time drawing and receiving the salary of said receiver; and said Bailey, by and in pursuance of said confederacy, appointed said Johnson superintendent of the said railroad, for which he was separately paid, and gave him certain contracts, whereby said Johnson became the holder and owner of receiver's certificates to a large amount, which became a charge upon the road superior to said mortgage bonds then being foreclosed; that said J. J. Horner was then one of the attorneys for the Union Trust Company aforesaid in said foreclosure suit and a party to all said proceedings and aider and abet-or therein; that S. H. Horner is the brother of said J. J. Horner and now pretends to have purchased said railroad at said foreclosure sale as trustee for said A. H. Johnson; and afterwards the said Johnson and J. J. Horner—pretending to be stockholders of the said Arkansas Midland Railroad Company; that it never was consolidated in the manner —; that it was and still is an independent corporation—met and, with others whom they pretended to have qualified by issueing a few shares of stock therein, assumed to elect themselves as directors, and then, as such pretended directors, they again met and by common consent selected from among themselves the officers for the company, as follows: A. H. Johnson, president and general manager; John J. Horner, vice-president; S. H. Horner, secretary; and the said S. H. Horner, who had purchased as aforesaid and then held the said railroad and appurtenances as trustee as aforesaid, thereupon assigned, conveyed, set over, and delivered the same to the said Arkansas Midland Railroad Company for an expressed consideration of six hundred thousand dollars; which consideration, however, or any part thereof, was in fact never paid to or received by said S. H. Horner, as trustee or otherwise, directly or indirectly.

Your orator attaches hereto a copy of said last-mentioned conveyance, marked Exhibit B, which he prays may be taken as a part hereof. Your orator charges that as against your orator and all other holders of the bonds of the State issued to said Arkansas Central Railway Company the said Arkansas Midland Railroad Company is in law the same corporation which issued and negotiated said bonds in possession of its property, subject to the lien and

priority created by said act of July 21st, 1867, as aforesaid. Your orator further states that said J. J. Horner, without any consideration whatever, in pursuance of the scheme aforesaid and as a reward for his services as aider and abet-or therein, had conveyed to him a third interest in said railway property, and said S. H. Horner under like circumstances, for the same unlawful consideration, a sixth interest therein by the said A. H. Johnson, as will appear by reference to the conveyance thereof, a copy of which is hereto attached as a part hereof, marked "Exhibit C;" that by reason of the premises they are not *bona fide* holders of said property without notice for valuable consideration.

Your orator states that before the sale aforesaid of the said railroad and appurtenances to said S. H. Horner the Arkansas Central Railway Company held the same, subject to the lien for the taxes imposed thereon by the act of July 21st, 1868, and the remedy therein provided for the collection thereof, and the further remedy provided by the act of April 10th, 1869, aforesaid, for the payment of the interest on the bonds issued to said railroad company by the State of Arkansas under the acts aforesaid, and that the Ar-
12 kansas Midland Railroad Company received and now holds the railroad and property and railroad aforesaid, as well as the revenue and income thereof, or so much thereof as will pay the interest on the bonds issued by the State of Arkansas to said railway company as aforesaid and provide a sinking fund as therein contemplated. Your orator states that the General Assembly of the State of Arkansas, not being mindful of the interests of your orator and other holders of the bonds issued by said State to the Arkansas Central Railway Company, but with intent to hinder, delay, and embarrass your orator and all other holders of the bonds issued by said State to said railway company, did, on the 29th of May, 1874, enact as follows, to wit:

"SECTION 1. That an act entitled 'An act to provide for paying the interest of bonds issued to aid in the construction of railroads, approved April 10th, 1869,' be, and the same is hereby, repealed;" which said act was on that day approved and became a law, as it is pretended and claimed; that since the passage of said act the State of Arkansas, its officers, agents, and attorneys, have neglected and refused and now neglect and refuse to take any steps towards enforcing the payment of the interest on the bonds issued by the State of Arkansas to the said Arkansas Central Railway Company, and that by reason of such refusal the defendant, the said Arkansas Midland Railroad Company, is daily receiving the income and revenue from the operation of said railroad and are appropriating and have appropriated the said income and revenue to its own use and the use of A. H. Johnson and J. J. Horner and no portion thereof to the payment of the past-due interest on the bonds issued by the State of Arkansas to said railway company, to the great wrong, damage, injury, and annoyance of the holders of said bonds and interest coupons issued by the State of Arkansas to the railway company as aforesaid.

Your orator states that he is the owner and holder for value be-

fore maturity of the following described coupons attached to five bonds of one thousand dollars each issued by the State of Arkansas to the Arkansas Central Railway Company, all of which are now due and payable, to wit:

Number of bond.	Number of coupons.	Amount.
320	20, from 6 to 25, inclusive, $35 each.....	700 00
342	18, from 8 to 25, inclusive, $35 each.....	630 00
343	18, from 8 to 25, inclusive, $35 each.....	630 00
344	18, from 8 to 25, inclusive, $35 each.....	630 00
454	20, from 6 to 25, inclusive, $35 each.....	700 00

with interest from the maturity of each coupon until paid.

That the Arkansas Central Railway Company is hopelessly insolvent and by the foreclosure aforesaid and the sale thereunder left entirely without property of any kind from which income or revenue might or could be derived; that said corporation is practically dissolved, its directory abandoned, and its property in the hands of the former president and vice-president, who repudiate the just and lawful liens that now and heretofore have existed thereon.

Your orator shows that under the acts of July 21st, 1868, and April 10th, 1869, aforesaid, under which said bonds were issued by the State, it was not contemplated by said acts or the said railway company or the State of Arkansas that the latter should pay the same or the interest thereon out of its own revenues; that as
13 between said State of Arkansas and said railway company said bonds and coupons were accommodation paper and, in point of fact and in equity, the obligation of said railway company; that the acts of July 21st, 1868, and April 10th, 1869, aforesaid, were printed and public acts of the State of Arkansas; that the only consideration which was received by the issuance and utterance of said bonds passed to and was received by the said railway company; that the only value which said bonds possessed arose out of the fact that the "income and revenue" of the said railway company were pledged for the ultimate redemption of the principal and interest thereof, and that the remedy by sequestration was provided by said acts to enforce the prompt payment of the same; and, further, that by virtue of the "special guaranty," hereinbefore referred to, endorsed on said several bonds, the said Arkansas Central Railway Company equitably appropriated and assigned "its income and revenue," as contemplated by said acts, to the payment of the principal and interest thereof, and there now exists in favor of your orator and other holders of said bonds an equitable lien or charge upon said railroad property and its earnings to the extent necessary to discharge the interest due and unpaid, and that such equitable lien or charge continues to attach as said interest matures from time

to time until the same together with the principal amounts of said bonds have been fully paid; that said "special guaranty" operated substantially and in effect to raise a trust which binds said railway property and its earnings, and the defendants, who took the same with notice thereof, as is shown herein, are in equity obliged to fulfil said trust.

And your orator further shows that the said A. H. Johnson and J. J. Horner, although well advised as officers and stockholders as to the condition and affairs of the Arkansas Railway Company, in order to obtain the issuance to said company of said railroad aid bonds, made and caused to be made a statement under oath, conformably to the requirements of the act aforesaid, on the 21st day of April, 1871, to the effect that the available resources of said railway company in subscriptions of capital stock, in moneys, lands, and other means *well* sufficient to prepare one hundred consecutive miles of railroad for the iron rails, when, in truth and in fact—as said Johnson and Horner then well knew—said railway company did not possess the available resources aforesaid; and he charges that said statement was made with the fraudulent intent to impose on and mislead the State authorities and to secure from the State of Arkansas, without legal right or authority, ostensibly for said railway company but really and in fact for themselves and for their own private gain and profit, the issuance of said railroad aid bonds as aforesaid; that, by means of said false and fraudulent statement, the said bonds were awarded to and obtained by said railway company; that in and by said act it was further provided that, after the showing aforesaid as to available resources, *that* the governor of the State should be authorized to issue to the president of said railway company the said aid bonds upon the completion and preparation for the iron rails of each succeeding ten miles or more of road until the entire line should be completed; and, further, the president of said railway company was required to file his official receipt for each issue of bonds, accompanied by the affidavit of himself and at least four directors that the bonds or the avails of them should be disposed of solely for the purpose of providing for the ironing, equipping, building, and completing of said road; and your orator alleges that notwithstanding said persons, the said defendants, as officers and stockholders as aforesaid, by means of false and fraudulent statements made and caused to be made by them as to the completion of consecutive sections of railroad ready for the iron rails, whereby the State authorities were deceived, procured, without right or authority, the issuance to said railway company of the whole amount of $1,350,000 of aid bonds as aforesaid; and your orator charges that no part of said railroad was built or completed ready for the iron rails when the said bonds or any installments thereof were applied for and issued, and although the said railway company, by and through said defendants, solemnly obligated itself to devote the avails and proceeds thereof as above stated and required by said act, the same were fraudulently diverted from such purpose and appropriated to the use and advantage of

said defendants with the exception of the first forty-eight miles of road now in operation.

CARUTH AND ERB,
For Plaintiff.

That said railway company, by putting said State bonds on the market with the recitals therein contained—that they were issued under and in pursuance of an act of the General Assembly of the State of Arkansas approved July 21st, 1868, entitled "An act to aid in the construction of railroads, the *the* said act having been submitted to and duly ratified by the people of the State at the general election held November 3rd, 1868"—was, in connection with the guarantee endorsed thereon as aforesaid, a solemn declaration to all persons receiving said bonds that the remedies therein mentioned and the liens thereby created existed and could be enforced, and the same estops the said railway company, as well as all persons claiming under them or it whose claims are junior in time, from denying the validity of the acts aforesaid or the bonds issued thereunder; that the said S. H. Horner, A. H. Johnson, J. J. Horner, and the said Arkansas Midland Railroad Company were well advised of the award of State aid granted to said railway company by the said board of railroad commissioners, as aforesaid, before they or any of them acquired said railroad and appurtenances at said foreclosure sale, and that said J. J. Horner and A. H. Johnson were officers of said railway company, applied for and received said State aid, and they and each of them and said Arkansas Midland Railroad Company are, in law and in equity, estopped from denying the validity of said acts of *of* July 21st, 1868, and April 10th, 1869, and the bonds so issued by the State as aforesaid.

Your orator submits that while it may be held that the act of July 21st, 1868, is not sufficient to sustain the issue of the bonds therein described, and that while the same may be held to be unconditional, that the credit of the State being in jeopardy, it was competent for and within the powers of the General Assembly of the said State to provide against any and all emergencies and to create means for the payment of the bonds and the interest thereon which were then issued or to be issued, and by said act of April 10th, 1869, the Gen-

14 eral Assembly did in fact provide by law means to enforce payment of the principal and interest on the bonds issued or to be issued under said act of July 21st, 1868; that said act of April 10th, 1869, was and is a public act, enacted before the granting of aid to said Arkansas Central Railway Company and before the execution of the mortgage to the Union Trust Company aforesaid, and constituted a public and statutory notice of the matters and things therein contained and of the liens, rights, and remedies therein provided for the enforcement of the payment of the interest and principal of said bonds, and that the said railroad and appurtenances, its income and revenue, were pledged for the payment of said State aid bonds and was also notice to all persons holding bonds secured by said trust deed to said Union Trust Company of a prior right, lien, and equity to that of persons claiming by, under, or through

said mortgage or trust deed. Your orator submits that the attempt made by the General Assembly of the State of Arkansas to deprive him of the benefit and provisions of the act of April 10th, 1869, aforesaid, by the passage of the act of May 29th, 1874, is an attempt to impair the obligation of the contracts of his said bonds and deprive him of a valuable remedy for the enforcement thereof, and the same is therefore unconstitutional and void. Your orator shows that said Arkansas Midland railroad is not worth exceeding two hundred and fifty thousand dollars, and that the said Arkansas Midland Railroad Company has no other property, and by reason of the large issue of said State aid bonds as aforesaid and of its other obligations it is hopelessly insolvent, and that it has been and still is misappropriating its income and revenues. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby and herein prayed for (your orator hereby waiving the answer of defendants under oath), that they severally answer according to the best of their knowledge and remembrance all and singular the matters aforesaid, paragraph by paragraph.

Your orator prays that a receiver be appointed by this honorable court to take possession and into his custody, of and by writ of sequestration or other lawful process, of the property, incomes, and revenues of the railroad, property, and appurtenances which the defendant, The Arkansas Midland Railroad Company, are now in possession of and which it acquired by or through said S. H. Horner, purchaser at the foreclosure sale hereinbefore referred to, and also of the betterments, improvements, and additions thereto, and that said receiver continue in such possession until he shall have received an amount of income and revenue to pay the costs and expenses of sequestration and an amount of income and revenue sufficient to pay the amount of interest coupons due and payable on the bonds issued by the State of Arkansas and delivered to the said Arkansas Central Railway Company, as hereinbefore set forth, and which may hereafter become due during and pending such sequestration, as evidenced by the coupons attached to said bonds and held by your orator and such other parties as may become parties to this suit, and until said coupons shall be fully paid.

That an account be had and stated of the revenues and income received by the defendant railroad company since it went into possession of said property of the Arkansas Central Railway Company down to the time of the filing of this bill, and that the amount so found be by this honorable court directed to be paid to your orator and such other persons, holders of said State aid bonds aforesaid, as may become parties to this suit, and in default of such payment by a day to be named the said amount or so much as may then

15 be due to your orator and other parties to this bill be decreed a lien on the said railroad, appurtenances, and property aforesaid and the same sold.

That if your honors should hold that your orators have but a second lien or lien junior to said mortgage and incumbrance, then that your orator and such other persons as may become parties to

the bill, for themselves and all others having and holding the said bonds of the State, be decreed to have an equity of redemption in and to said railroad, its appurtenances, and other property, and that such equity be declared and the amount to be paid accurately ascertained; that your orator have such other and further relief as may seem meet in the premises and as equity and good conscience require.

May it please your honors to grant unto your orators a writ of subpœna, to be directed to said Arkansas Central Railway Company, the Arkansas Midland Railroad Company, and the Union Trust Company, commanding them and each of them, at a time certain, under a certain penalty therein to be stated, personally to appear before your honors and this honorable court and then and there full, true, and perfect answers make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as — this honorable court shall seem meet.

J. ERB,
Solicitor for Complainants.

NEWMAN ERB, *Of Counsel.*

J. Erb, being sworn, states that he is the attorney of the plaintiff in this cause, who is absent from the eastern district of Arkansas; that the facts set forth in the bill of complaint herein are true so far as stated on personal knowledge, and where stated on information and belief he believes them to be true.

J. ERB.

Subscribed and sworn to before me this 1st day of August, 1889.

——— ———.

We are responsible for costs as usual.

N. AND J. ERB.

This agreement made and entered into this 15th day of July A. D. 1880, by and between A. H. Johnson of the one part, and first party and John J. Horner and Sidney H. Horner of the other part and second party hereto, all citizens of Phillips county in the State of Arkansas witnesseth:

That the said first party has this day sold and by these presents does hereby sell and convey unto said second party an undivided one-half interest in and to the Ark. Midland railroad its property, charter and franchise and the claim against the Iron Mountain and Helena Railroad Company in the contracts for constructing the same from the junction with the said Mid. R. R. to the town of Marianna and an undivided one-fourth interest in and to the wharf-boat and shipping business now carried on by Berton & Johnson at Helena, Arkansas, for the consideration and sum of one hundred thousand dollars, which is to be paid him out of their interest in the profits, business or proceeds arising from said hereinbefore-described property and business from sales or otherwise, and it is

hereby agreed until said sum of one hundred thousand dol-
16 lars is paid as aforesaid to said first party or shall be otherwise paid to him, the said second party shall not without the consent of said first party receive or withdraw any part of the profits arising from said railroad or shipping business, and the title to said hereinbefore-described property shall vest in said second party, subject to an absolute lien in favor of said first party for the payment of said purchase-money and he shall have the right to control all funds arising from said business and property until said sum is fully paid to him, and it is further understood and agreed that the said John J. Horner is to own one-third interest and said Sidney H. Horner is to own one-sixth interest in said hereinbefore-conveyed property and interest.

Witness our hands and seals this day and year above written.

Signed in duplicate.

A. H. JOHNSON. [SEAL.]
JOHN J. HORNER. [SEAL.]
SIDNEY H. HORNER. [SEAL.]

The following endorsements appear on the bill: Filed and writ issued January 10th, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C. Writ issued for Union Trust Company June 19th, 1889. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

17 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 23rd day of October, anno Domini one thousand eight hundred and eighty-two, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on March 5, 1883:

THOMAS C. MCKITTRICK }
v. } 513.
ARKANSAS MIDLAND RAILROAD COMPANY *et al.* }

Come the defendants, by Tappan and Horner and Charles C. Waters, their solicitors, and enter herein their appearance.

18 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 24th day of October, anno Domini one thousand eight hundred and eighty-seven, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding

said court, the following proceedings were had, to wit, on December 17, 1887:

THOMAS C. McKITTRICK
vs. } 513.
THE ARKANSAS MIDLAND RAILWAY COMPANY *et als.*

Come the defendants, by John J. Hornor, Esq., their solicitor, and file herein their demurrer to the complaint; which demurrer is in words and figures following:

In the United States Circuit Court for the Eastern District of Arkansas.

19 McKITTRICK
vs.
THE ARKANSAS CENTRAL RAILWAY COMPANY *et als.*

The defendants come and demur to the complainant's bill filed herein and for cause of demurrer say that there is no equity in said complainant's bill.

JNO. J. HORNER,
Sol'r for Defendants.

STATE OF ARKANSAS, }
County of Phillips. }

I, Jno. J. Hornor, of counsel in above cause for defendants, do hereby certify that, in my opinion, the demurrer of the defendants to complainant's bill is well founded in point of law and should be sustained.

JNO. J. HORNOR,
Solicitor for Defendants.

STATE OF ARKANSAS, }
County of Phillips. }

I, A. H. Johnson, president of the Arkansas Central Rail-
20 way Company, do solemnly swear that the demurrer filed by defendants in the above and foregoing cause is not interposed for delay, but is interposed on advice of counsel as a meritorious defence.

A. H. JOHNSON.

Sworn to and subscribed before me this 16th day of December, A. D. 1887.
[SEAL.] SAMUEL I. CLARK, *Clerk.*

Endorsed: Filed December 17, 1887. Ralph L. Goodrich, clerk.

21 UNITED STATES OF AMERICA, }
Western Division of Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of

Arkansas, begun and holden on Monday, the twenty-second day of October, A. D. one thousand eight hundred and eighty-eight, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on January 7th, 1889:

THOMAS C. MCKITTRICK
vs. } 513.
ARKANSAS MIDLAND RAILROAD COMPANY *et al.*

Comes the complainant, by J. Erb, Esq., his solicitor, and on his motion it is ordered that said complainant be, and he is hereby, granted leave to amend his original bill of complaint herein, without payment of costs, on or before the next succeeding rule day of this court, by showing that twelve additional interest coupons have matured on each of the five bonds held by him, and that the whole amount now due and owing aggregates five thousand three hundred and ninety dollars, and that the recovery and relief prayed for be in said last-mentioned amount.

(Signed at end of day's proceedings.)

HENRY C. CALDWELL, *Judge*.

22 And on the same day an amendment to original bill was filed as follows:

Amendment to Original Bill.

In the Circuit Court of the United States for the Eastern District of Arkansas.

THOMAS C. MCKITTRICK
vs.
ARKANSAS MIDLAND RAILROAD COMPANY. } Amendment to Original Bill.

Comes the complainant and by way of amendment to his original bill of complaint herein says: That since the date of the filing of his said original bill twelve additional coupons have matured on each of the five bonds mentioned and described therein; that said coupons represent unpaid and past-due semi-annual interest on said bonds and severally calls for the payment of $335.00, making in all $2,100 of newly accrued indebtedness; that the whole amount now due and owing to complainant for and on account of defaulted interest is as follows, viz:

Number of each bond.	Number of coupon.	Am't of each.	Total amount.
320	32, from 6 to 37, both inclusive...	835 00	1,120 00
342	30, from 8 to 37, both inclusive...	35 00	1,050 00
343	30, from 8 to 37, both inclusive...	35 00	1,050 00
344	30, from 8 to 37, both inclusive...	35 00	1,050 00
454	32, from 6 to 37, both inclusive...	35 00	1,120 00
	Aggregate sum.....	.....	5,390 00

J. ERB,
Solicitor for Complainant.

Endorsed: Filed January 7, 1889. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

23 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 8th day of April, anno Domini one thousand eight hundred and eighty-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on June 20, 1889:

THOMAS C. McKITTRICK
vs. } 513.
THE ARKANSAS MIDLAND RAILROAD COMPANY, ARKANSAS Central Railway Company, and Union Trust Company of New York.

And now, on this day, comes the complainant, by Jacob Erb, Esq., his solicitor, and it appearing to the court that this suit is brought to establish a lien upon the Arkansas Midland railroad and the income and revenue thereof for the payment of certain bonds issued by the State of Arkansas in aid of the Arkansas
24 Central Railway Company, and that the defendant The Union Trust Company of New York is not an inhabitant of nor found within this district; that a subpœna in chancery issued in this case and directed to the said defendant has by the marshal of this district been returned not found as to the said defendant, and that said defendant has not voluntarily appeared to this action, and it further appearing that the said defendant is a resident of the southern district of New York, whereupon it is ordered that said

defendant, The Union Trust Company, appear to this action and plead, answer, or demur thereto on the first Monday of August, 1889.

And it is further ordered that a duly certified copy of this order be served on said Union Trust Company by the United States marshal or any of his lawful deputies of the district in which said defendant is found, whose return in due form, endorsed on a copy of this order, shall be sufficient evidence of the service thereof; and it is further ordered that a duly certified copy of this order be served upon the Arkansas Midland Railroad Company, which is now in possession of the property upon which complainant seeks to establish his lien aforesaid.

25 And on July 19, 1889, the following proceedings were had, to wit:

THOS. C. McKITTRICK
vs. } 513.
ARKANSAS MIDLAND RAILROAD COMPANY *et al.*

Comes the complainant, by J. Erb, Esq., his solicitor, and come the defendants, by John J. Horner, Esq., their solicitor, and file herein the following agreement:

"It is agreed that the demurrer of the Arkansas Midland Railroad Company to the bill in the above cause be argued and submitted on the third Tuesday in November, 1889.

(Signed) J. ERB,
JNO. J. HORNOR,
For Arks. M. R. R. Co.

It is therefore ordered that said demurrer be set down for final hearing accordingly.

26 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 28th day of October, anno Domini one thousand eight hundred and eighty-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 12, 1889:

THOS. C. McKITTRICK
vs. } 513.
ARKANSAS MIDLAND RAILROAD COMPANY *et als.*

Come the defendants, by John J. Hornor and Charles C. Waters, Esqs., their solicitors, and file herein their demurrer to the bill, and

comes the plaintiff, by Caruth and Erb, Esqs., his solicitors, and by consent this cause is set down for hearing on November nineteenth next.

27 And on November 19, 1889, the following proceedings were had, to wit:

THOMAS C. MCKITTRICK *vs.* ARKANSAS MIDLAND RAILROAD COMPANY, THE ARKANSAS CENTRAL RAILWAY COMPANY, THE UNION TRUST COMPANY.	513.	Decree.

Comes the complainant, Thomas C. McKittrick, by Caruth & Erb, Esqs., his solicitors, and the defendants, The Arkansas Midland Railroad, The Arkansas Central Railway Company, and The Union Trust Company, by John J. Hornor, Esq., their solicitor, and the demurrer to the original bill of complaint now coming on to be heard and the same being argued and submitted to the court is by the court sustained; and thereupon—

It is ordered and decreed that said bill of complaint be, and the same is hereby, dismissed for want of equity; and thereupon the complainant prayed an appeal from said decree to the Supreme Court of the United States, which appeal is hereby granted and allowed.

28 And on February 17, 1890, the following proceedings were had, to wit:

THOMAS C. MCKITTRICK *vs.* ARKANSAS MIDLAND RAILROAD COMPANY *et als.*	513.	

Comes the complainant, by Caruth & Erb, Esqs., his solicitors, and files herein his bond to the Supreme Court of the United States on appeal, with J. W. Callaway and J. Erb as sureties, which is approved by the court; which bond and approval are in words and figures following, to wit:

Know all men by these presents that we, Thomas C. McKittrick and J. W. Callaway and J. Erb, as sureties, are held and firmly bound unto the Arkansas Central Railway Company, the Arkansas Midland Railroad Company, and the Union Trust Company in the full and just sum of five hundred dollars, to be paid to the said Arkansas Central Railway Company, Arkansas Midland Railroad Company, and Union Trust Company, as hereinbefore
29 named, their and each of their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventeenth day of February, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Arkansas, in a suit depending in said court between Thomas C. McKittrick, as complainant, and The Arkansas Central Railway Company and others, above named, as defendants, a decree was rendered against the said complainant, Thomas C. McKittrick, and the said complainant, Thomas C. McKittrick, having obtained an appeal to the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Thomas C. McKittrick shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his appeal
30 good, then the above obligation to be void; else to remain in full force and virtue.

THOS. C. McKITTRICK,
By CARUTH & ERB, *His Att'ys.*
J. W. CALLAWAY.
J. ERB.

UNITED STATES OF AMERICA, }
Eastern District of Arkansas, } ss:

——— ———, being first duly sworn, on his oath says that he is worth in property situated in the State of Arkansas and exceeding his constitutional exemptions and all his debts and liabilities the sum of five hundred dollars.

——— ———.

Sworn to and subscribed before me this 17th day of February, 1890.

——— ———.

Endorsed: This bond taken and approved this 17th day of Feb'y, 1890. (Signed) Henry C. Caldwell, U. S. dist. judge. Filed Feb. 17, 1890. Ralph L. Goodrich, clerk.

31 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas, }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office and constitute a true copy of the record and of the assignment of errors and of all proceedings in the case of Thomas C. McKittrick *vs.* The Arkansas Midland Railroad Company *et al.*

In witness whereof I have hereunto set my hand and the seal of said court this seventh (7th) day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fifteenth.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

Attest:

RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

Endorsed on cover: Case No. 14,263. E. Arkansas C. C. U. S. No. 248. Thomas C. McKittrick, appellant, *vs.* The Arkansas Central Railway Company, The Arkansas Midland Railroad Company, and The Union Trust Company. Filed October 13, 1890.

Office Supreme Court U. S.
FILED.
JAN 31 1894
JAMES H. McKENNEY
CLERK

RECORD, CASE No. 14,263.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM NO., 248.

THOS. C. McKITTRICK, *Appellant.*

v.

THE ARKANSAS CENTRAL RAILWAY COMPANY, THE ARKANSAS MIDLAND RAILWAY COMPANY, AND THE UNION TRUST COMPANY, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

ABSTRACT, BRIEF AND ARGUMENT

J. ERB,
M. M. COHN, *Solicitors for Appellant.*

ARKANSAS LITHO. AND PT'G CO., LITTLE ROCK

RECORD, CASE No. 14,263.

IN THE SUPREME COURT OF THE UNITED STATES

THOS. C. McKITTRICK, *Appellant.*

v.

THE ARKANSAS CENTRAL RAILWAY COMPANY, THE ARKANSAS MIDLAND RAILWAY COMPANY, AND THE UNION TRUST COMPANY, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

ABSTRACT, BRIEF AND ARGUMENT

J. ERB,
M. M. COHN, *Solicitors for Appellant.*

FILED OCTOBER 13, 1890.

ABSTRACT OF THE RECORD.

Thomas C. McKittrick filed his original and amended bill of complaint in equity in the United States Circuit Court for the Eastern District of Arkansas against the appellees, to which they interposed their demurrer, upon the ground that "there is no equity in the bill." (Printed Record, 19). This demurrer was sustained by the court. (*Id.*, 23.) And from the decree thereupon entered, dismissing said bill, this appeal has been taken. (*Id.*, 23, *seq*).

The original bill and its amendment disclose the following state of facts:

That McKittrick was the owner of five coupon bonds of the denomination of one thousand dollars each, issued by the State of Arkansas, under certain acts of the General Assembly of that State, to the Arkansas Central Railway Company, to aid in the construction of the latter's road, and which bonds were guaranteed by the said company in words and figures as follows:

"For a valuable consideration, the Arkansas Central Railway Company hereby guarantee to the holder of the within bond the payment of the principal thereof when due and of the interest theron as

the same accrues by the State of Arkansas; and on default of said State of Arkansas to pay such principal or interest or either, as the same shall become due, the Arkansas Central Railway Company agree to pay the same to said holder upon the delivery of the within bond or of the coupon for the interest thereon upon which a default of payment shall have been made."

That the bonds owned by the complainant were numbered 320, 342, 343, 344, 454, and the matured coupons thereon aggregated as follows:

No. of bond.	Number of Coupon.	Amount of each.	Total amount.
320	32, from 6 to 37, both inclusive	$35 00	$1,120 00
342	30, from 8 to 37, both inclusive	35 00	1,050 00
343	30, from 8 to 37, both inclusive	35 00	1,050 00
344	30, from 8 to 37, both inclusive	35 00	1,050 00
454	32, from 6 to 37, both inclusive	35 00	1,120 00
	Total.....		$5,390 00

(*Id.*, 1 to 17; 19 to 21.)

The circumstances attending the issuance and sale of said bonds, also the issuance and sale of other so-called mortgage bonds by the officers and directors of said railway company; and the extraordinary manner in which the property of the said railway company was, at a nominal price, engineered out of the old company into a new one by its officers and directors, are detailed substantially as follows, in said bill:

That said Arkansas Central Railway Compay was duly created and organized and authorized to construct, maintain and operate a railroad from the city of Helena, in the county of Phillips, through the counties of Phillips, Monroe, Arkansas, Prairie and Pulaski, to the city of Little Rock, in said last named county, all in the State of Arkansas, said line so located, exclusive of side tracks, being one hundred miles in length; and also a branch railroad from a point on its main line at or near Aberdeen to the city of Pine Bluff, in the county of Jefferson.

That on said last-mentioned date, upon required proof being made by said railroad company and its officers to the governor of the State and filed in the office of the secretary of state, the governor aforesaid issued and delivered and caused to be issued and delivered, on the award of the loan of the credit of said State, unto said Arkansas Central Railway Company one hundred and fifty bonds of one thousand dollars each, of the character, kind and description hereinafter set out and described, numbered from one to one hundred and fifty, both inclusive.

That thereafter from time to time, at the dates hereinafter mentioned, on proof as by said act required, said board of commissioners issued and delivered or caused to be issued and delivered by the

proper officers to said railway company, like bonds of like denomination as follows, to-wit:

On April 25th, 1871, the sum of.....	$150,000
On July 19th, 1871, the sum of.....	150,000
On September 26th, 1871, the sum of.....	150,000
On November 6th, 1871, the sum of.....	150,000
On January 9th, 1872, the sum of.....	150,000
On July 30th, 1872, the sum of.....	150,000
On September 25th, 1872, the sum of.....	150,000
On February 21st, 1873, the sum of.....	150,000
On July 12th, 1873, the sum of.....	150,000

Being in all an issue and delivery, as aforesaid, of thirteen hundred and fifty bonds of one thousand dollars each, numbered from one to 1350, inclusive.

Your orator states that after the said application of said railway company for the loan of the credit of the State and the bonds aforesaid, and after the award of the same thereto by the said board of railroad commissioners as aforesaid, to-wit, on the 3d day of July, A. D. 1871, the said railway company executed a mortgage or deed of trust to the Union Trust Company of New York, as trustee, to secure the payment of one million two hundred thousand dollars, evidenced by coupon bonds bearing interest at the rate of seven per centum per annum, in said mortgage or deed of trust specifically described, which embraced all the property and

appurtenances of said railway company; that said mortgage or deed of trust was not filed for record or recorded in the county of Pulaski, in the recorder's office thereof, until ——, 1871, and was not filed for record in the other counties through which said railway was to be constructed, operated and maintained until after said date; that under said mortgage or deed of trust there were executed and delivered to said trustee one thousand of said bonds for the sum of one thousand dollars each, numbered from one to one thousand, both inclusive, and four hundred for the sum of five hundred dollars each, and numbered from one thousand and one to fourteen hundred, both inclusive. It was further in said mortgage or trust deed provided that none of said bonds should be deemed issued under said mortgage or in anywise entitled to the benefit or security thereof, or be in anywise obligatory upon said railway company, as an evidence of debt or otherwise, unless or until there should be endorsed thereon a certificate signed by the said Union Trust Company, a certificate signed by said trust company through its proper officer or its successor in trust, authenticating them as being duly and lawfully issued and secured. Your orator shows that of the said mortgage bonds there were signed and certified by said Union Trust Company and issued the amount of seven hundred and twenty thousand dollars.

That afterwards, to-wit, on the — day of April, 1873, the said railway company cancelled and had destroyed the remaining bonds unissued, to-wit, four hundred and eighty, of the denomination of one thousand dollars each, and on the same date executed and delivered to said Union Trust Company its second mortgage or deed of trust on the same property and appurtenances to secure the payment of nine hundred and sixty bonds, each for the sum of five hundred dollars, with interest coupons attached, representing the interest to become due thereon semi-annually at the rate of seven per centum per annum. It was provided in said second mortgage or deed of trust that none of said bonds should be deemed issued under said mortgage or in anywise entitled to the benefit or security thereof, or be in anywise obligatory upon said railway company as an evidence of debt or otherwise, unless or until there should be endorsed thereon a certificate signed by said trust company, a certificate signed by it through its proper officer, authenticating them as being duly and lawfully issued and secured. Your orator shows that of said second-mortgage bonds there were issued, signed, and certified the amount of four hundred and eighty thousand dollars.

That on the 6th day of September, 1876, a suit was instituted in this honorable court, on the equity

side thereof, in the Helena division, the style thereof being as follows: "Union Trust Company of New York v. Arkansas Central Railway Co."

That among the allegations made in said bill of complaint by said trustee is the following, to-wit:

"Twelfth. Your orator further shows that the State of Arkansas has or pretends to have some claim or lien on said railway and the other property of said Arkansas Central Railway Company so mortgaged to your orator as aforesaid, the particulars and nature of which are unknown to your orator, and therefore your orator cannot more particularly state the same."

Your orator states that the prayer of said bill of complaint in relation to the bonds issued by the State of Arkansas to the said Arkansas Central Railway Company is as follows, to-wit:

"Your orator prays that it may be ascertained and adjudged what, if any, estate or interest the State of Arkansas has in the said mortgaged property, and also whether the same is prior and superior to or subsequent and subject to the rights, estate, and interest of your orator under the two said several mortgages herein described."

Your orator alleges that neither the State of Arkansas, which cannot be sued, or any of the holders of the bonds issued by the State of Arkansas to the Arkansas Central Railway Company or the holders of coupons attached thereto were represented in or parties to said suit in which said Union Trust Company was complainant, nor was any decree therein rendered which in any manner

determined the priority of said bonds or whether the lien of the State of Arkansas to and for the use and benefit of the holders of said State aid bonds was subordinate in point of time or equity to that of the bonds issued under the mortgages aforesaid; that in said suit the said railway company, after being duly served with the writ of subpœna, having failed to appear, answer, or demur to said bill of complaint, on the first day of January, 1877, a decree *pro confesso* was taken and entered in the cause, and thereafter, on March 17th, 1877, a final decree was therein taken and entered against said Arkansas Central Railway Company, and it was decreed, among other things, that the whole amount of bonds issued under said mortgage, with the interest thereon, was due; that unless the said defendant shall pay or cause to be paid to said complainant trust company, on or before a day certain therein named, the sum thereof, being the said principal and interest, with costs of suit, the said mortgages shall be foreclosed, and that the equity of redemption of said railway company shall henceforth be barred from all equity of redemption under said mortgage, and that in default of payment the mortgaged premises mentioned in the bill be sold.

That said defendant railway company did not pay the amount of said decree within the time therein limited, and on the 26th day of July, 1877, the mortgaged property aforesaid was sold by a

master commissioner appointed by the court for the sum of forty thousand dollars to S. H. Horner, as trustee, for certain uses hereinafter mentioned, who became the purchaser thereof, as trustee, at said sale. Your orator further shows that pending said foreclosure proceeding a receiver was appointed to take charge of said railway, its property and appurtenances, and that said receiver took charge of the same; that by authority of the court betterments were placed on said railway and property acquired of the value of twenty-five thousand dollars or thereabouts; that said railway was then completed, equipped, and in operation for a distance of forty-eight miles and was worth upwards of four hundred thousand dollars; that on the 28th day of June, 1877, there was filed in said court and in said cause by the Lombard Syndicate (Limited), a corporation of England, by and through whom the said railway company had sold and negotiated many or all of the said State bonds issued to said Arkansas Central Railway Company and which was then the holder of some of said bonds, a notice and protest, which was in words as follows:

"PROTEST.

"We, the undersigned, having by public subscription offered and allotted the bonds of the State of Arkansas given in aid of the Arkansas Central

Railway and issued to this railway under the act of the State of 21st July, 1868, which issue was made on April 1st, 1870, therefore prior to the so-called first mortgage, bearing date July 3rd, 1871, and the above-mentioned bonds being endorsed by the railway as follows: 'Special guarantee endorsed by the railway company on each bond:' For a valuable consideration the Arkansas Central Railway Company hereby guarantee to the holder of the within bond the payment of the principal thereof when due and of the interest thereon as the same accrues by the State of Arkansas, and in default of said State of Arkansas to pay such principal or interest, or either, as the same shall become due, the Arkansas Central Railway Company agree to pay the same to said holder upon the delivery of the within bond or of the coupon for the interest thereon upon which a default in payment shall have been made.

"We, on our own behalf and in behalf of the holders of these bonds, hereby solemnly protest against the sale of this railway, as ordered by the court, except due provisions are made for the priority of the above issue, and hereby give notice to all purchasers or intended purchasers that they will buy the road subject to the above claims. This protest has been executed in triplicate, one of which has been forwarded to the registrar of the court to

bring it to the notice of the court, one to the receiver, and the third to Messrs. Tappan and Horner, with a request to read it publicly at the time and place of sale.

"HENRY P. PRICE,

"Secretary of the Lombard Syndicate (Lim-
"ited), of June 1st, 1877, 3 Circus Place,
"Finsbury, London, England.

"Sealed by order and in the presence of—
"HENRY PERKINS PRICE." [SEAL.]

Your orator shows that said protest and notice were in fact received by said receiver before said foreclosure sale, as also by said Tappan and Horner, who read said notice and protest at and before said sale, in the presence of and in the hearing of said S. H. Horner and his alleged *cestui que trusts*. Your orator states that the General Assembly of the State of Arkansas, not being mindful of the interest of your orator and the other holders of the bonds issued by said State to the Arkansas Central Railway Campany, but with the intent to violate "the faith and credit of the State of Arkansas," which was "irrevocably pledged" by the act of July 21st, 1868, aforesaid, and to delay and embarrass your orator and all other holders of said bonds issued by the State to said railway company, did on the 29th day of May, 1874, enact as follows, to-wit:

"SECTION 1. That an act entitled 'An act to provide for paying the interest of bonds issued to aid in the construction of railroads, approved April 10th, 1869,' be, and the same is hereby, repealed."

That since the passage of said act the State of Arkansas, its officers, agents, and attorneys, have neglected and refused and now refuse to take any steps toward enforcing the payment of the interest on the said bonds issued to said Arkansas Central Railway Company.

Your orator further shows that by act of the General Assembly of the State of Arkansas approved January 20th, 1855, the Arkansas Midland Railroad Company was incorporated and authorized to construct a railroad from said city of Helena to said city of Little Rock. The charter authorized the company to make any lawful contract for uniting its road with any other road having the same terminus or which might at any intermediate point approach the said railroad; that on the 8th day of March, 1869, there was filed in the office of the secretary of state, at Little Rock, under the general railroad incorporation laws of said State, articles of association incorporating the Little Rock and Helena Railroad Company, the purpose of which was to construct a railroad from the city of Little Rock to said city of Helena; that on the 31st day of August, 1870, at a meeting of the board of directors of said Arkansas Midland Railroad Company, a res-

olution was adopted declaring that the said company be, and the same was thereby, consolidated with the said Little Rock and Helena Railroad Company under the name of "Arkansas Central Railway Company;" that at a meeting of the stockholders of the said Arkansas Midland Railroad Company and held on the 21st of September, 1870, it was unanimously resolved as follows:

"That the action of the board of directors of the company in changing the name of the road from the 'Arkansas Midland Railroad Company' to the Arkansas Central Railway Company be, and the same is hereby, confirmed."

That at a meeting of the directors of the Little Rock and Helena Railroad Company held on the 20th day of January, 1871, it was resolved as follows with respect to said consolidation:

"That we hereby agree to consolidate with said company under the name and style of the 'Arkansas Central Railway Company,' and do hereby authorize and empower W. H. Rogers, the president of this company, to convey unto said Arkansas Central Railway Company all the rights, privileges, and immunities that we have or may have had or by any means may hereafter become entitled to under or by virtue of said organization, and after said conveyance made this company shall utterly cease to exist."

That the conveyance therein referred to, was in fact made, and the rights, privileges and immunities of both companies were assumed, possessed, and controlled by the said Arkansas Central Rail-

way Company, the president of the Arkansas ~~Mid-~~land Railroad Company becoming president of the ~~former~~ company, which, thus formed and continued, is the defendant herein. Your orator shows that A. H. Johnson was the president of the said Arkansas Central Railway Company for a long time and up to and at the time of the foreclosure aforesaid, which he brought about; that he became the receiver of said road in said suit and for a long time acted as such; that he afterwards conspired with one W. W. Bailey and J. J. Horner to secure possession and control of said railroad, of which forty-eight miles had been completed and in operation, and to that end procured said Bailey to be appointed receiver in his place and stead, but all the time drawing and receiving the salary of said receiver; and said Bailey, by and in pursuance of said confederacy, appointed said Johnson superintendent of the said railroad, for which he was separately paid, and gave him certain contracts, whereby said Johnson became the holder and owner of receiver's certificates to a large amount, which became a charge upon the road superior to said mortgage bonds then being foreclosed; that said J. J. Horner was then one of the attorneys for the Union Trust Company aforesaid in said foreclosure suit and a party to all said proceedings and aider and abettor therein; that S. H. Horner is the brother of said J. J. Horner and now pretends to have pur-

chased said railroad at said foreclosure sale as trustee for said A. H. Johnson; and afterwards the said Johnson and J. J. Horner—pretending to be stockholders of the said Arkansas Midland Railroad Company; that it never was consolidated in a legal manner; that it was and still is an independant corporation—met and with others whom they pretended to have qualified by issuing a few shares of stock therein, assumed to elect themselves as directors, and then, as such pretended directors, they again met and by common consent selected from among themselves the officers for the company, as follows: A. H. Johnson, president and general manager; John J. Horner, vice-president; S. H. Horner, secretary; and the said S. H. Horner, who had purchased as aforesaid and then held the said railroad and appurtenances as trustee as aforesaid, thereupon assigned, conveyed, set over, and delivered the same to the said Arkansas Midland Railroad Company for an expressed consideration of six hundred thousand dollars; which consideration, however, or any part thereof, was in fact never paid to or received by said S. H. Horner, as trustee or otherwise, directly or indirectly.

Your orator further states that said J. J. Horner, without any consideration whatever, in pursuance of the scheme aforesaid and as a reward for his services as aider and abettor therein, had conveyed

to him a third interest in said railway property, and said S. H. Horner under like circumstances, for the same unlawful consideration, a sixth interest therein by the said A. H. Johnson, as will appear by reference to the conveyance thereof, a copy of which is hereto attached as a part hereof, that by reason of the premises they are not *bona fide* holders of said property without notice for valuable consideration.

Your orator states that before the sale aforesaid of the said railroad and appurtenances to said S. H. Horner the Arkansas Central Railway Company held the same, subject to the lien for the taxes imposed thereon by the act of July 21st, 1868, and the remedy therein provided for the collection thereof, and the further remedy provided by the act of April 10th, 1869, aforesaid, for the payment of the interest on the bonds issued to said railroad company by the State of Arkansas under the acts aforesaid, and that the Arkansas Midland Railroad Company received and now holds the railroad and property and railroad aforesaid, as well as the revenue and income thereof, or so much thereof as will pay the interest on the bonds issued by the State of Arkansas to said railway company as aforesaid and provide a sinking fund as therein contemplated. Your orator states that the General Assembly of the State of Arkansas, not being mindful of the interests of your orator and other holders of the

bonds issued by said State to the Arkansas Central Railway Company, but with intent to hinder, delay, and embarrass your orator and all other holders of the bonds issued by said State to said railway company, did, on the 29th of May, 1874, enact as follows, to-wit:

"SECTION 1. That an act entitled 'An act to provide for paying the interest of bonds issued to aid in the construction of railroads, approved April 10th, 1869,' be, and the same is hereby, repealed;" which said act was on that day approved and became a law, as it is pretended and claimed; that since the passage of said act the State of Arkansas, its officers, agents, and attorneys, have neglected and refused and now neglect and refuse to take any steps towards enforcing the payment of the interest on the bonds issued by the State of Arkansas to the said Arkansas Central Railway Company, and that by reason of such refusal the defendant, the said Arkansas Midland Railroad Company, is daily receiving the income and revenue from the operation of said railroad and are appropriating and have appropriated the said income and revenue to its own use and the use of A. H. Johnson and J. J. Horner and no portion thereof to the payment of the past-due interest on the bonds issued by the State of Arkansas to said railway company, to the great wrong, damage, injury, and annoyance of the holders of said bonds and interest coupons issued by the State of Arkansas to the railway company as aforesaid.

That the Arkansas Central Railway Company is hopelessly insolvent and by the foreclosure aforesaid and the sale thereunder left entirely without property of any kind from which income or revenue might or could be derived.

And your orator further shows that the said A. H. Johnson and J. J. Horner, although well advised as officers and stockholders as to the condition and affairs of the Arkansas Railway Company, in order to obtain the issuance to said company of said railroad aid bonds, made and caused to be made a statement under oath, conformably to the requirements of the act aforesaid, on the 21st day of April, 1871, to the effect that the available resources of said railway company in subscriptions of capital stock, in moneys, lands, and other means were sufficient to prepare one hundred consecutive miles of railroad for the iron rails, when, in truth and in fact—as said Johnson and Horner then well knew—said railway company did not possess the available resources aforesaid; and he charges that said statement was made with the fraudulent intent to impose on and mislead the State authorities and to secure from the State of Arkansas, without legal right or authority, ostensibly for said railway company but really and in fact for themselves and for their own private gain and profit, the issuance of said railroad aid bonds as aforesaid; that, by means of said false and fraudulent statement, the said bonds were awarded to and obtained by said railway company. That in and by said act it was further provided that, after the showing aforesaid as to available resources, the governor of the State should be authorized to issue to the president of said railway company the said

aid bonds upon the completion and preparation for the iron rails of each succeeding ten miles or more of road until the entire line should be completed; and, further, the president of said railway company was required to file his official receipt for each issue of bonds, accompanied by the affidavit of himself and at least four directors that the bonds or the avails of them should be disposed of solely for the purpose of providing for the ironing, equipping, building, and completing of said road. And your orator alleges that notwithstanding said provisions, the said defendants, as officers and stockholders as aforesaid, by means of false and fraudulent statements made and caused to be made by them as to the completion of consecutive sections of railroad ready for the iron rails, whereby the State authorities were deceived, procured, without right or authority, the issuance to said railway company of the whole amount of $1,350,000 of aid bonds as aforesaid; and your orator charges that no part of said railroad was built or completed ready for the iron rails when the said bonds or any installments thereof were applied for and issued, and although the said railway company, by and through said defendants, solemnly obligated itself to devote the avails and proceeds thereof as above stated and required by said act, the same were fraudulently diverted from such purpose and appropriated to the

use and advantage of said defendants with the exception of the first forty-eight miles of road now in operation.

That said railway company, by putting said State bonds on the market with the recitals therein contained to the effect that they were issued under and in pursuance of an act of the General Assembly of the State of Arkansas approved July 21st, 1868, entitled "An act to aid in the construction of railroads, the said act having been submitted to and duly ratified by the people of the State at the general election held November 3rd, 1868"—was, in connection with the guarantee endorsed thereon as aforesaid, a solemn declaration to all persons receiving said bonds that the remedies therein mentioned and the liens thereby created existed and could be enforced, and the same estops the said railway company, as well as all persons claiming under them or it, whose claims are junior in time, from denying the validity of the acts aforesaid or the bonds issued thereunder; that the said S. H. Horner, A. H. Johnson, J. J. Horner, and the said Arkansas Midland Railroad Company were well advised of the award of State aid granted to said railway company by the said board of railroad commissioners, as aforesaid, before they or any of them acquired said railroad and appurtenances at said foreclosure sale, and that said J. J. Horner and A.

H. Johnson were officers of said railway company, applied for and received said State aid, and they and each of them and said Arkansas Midland Railroad Company are, in law and in equity, estopped from denying the validity of said acts of July 21st, 1868, and April 10th, 1869, and the bonds so issued by the State as aforesaid.

The bill likewise recites the substance and effect of the acts of the General Assembly of the State of Arkansas, already mentioned, which will be more fully referred to in the brief, in order to avoid repetition.

The facts as detailed in said bill present several questions for the consideration and judgment of this honorable court.

1. What rights has McKittrick, (and others standing in the same position), under the acts of the General Assembly of the State of Arkansas, authorizing the issue of the said aid bonds in view of the guarantee endorsed thereon, as against the purchaser of the property of said company under foreclosure sale.

2. Assuming that said acts gave no lien upon the income or corpus of said property in virtue of the mere execution of said bonds by the State, what effect did the guaranty of the company have in making it the debtor, and in creating in favor of the

holders of said bonds an equity in its corpus as well as income; the proceeds of said bonds having been obtained by said company.

3. Could the officers and directors of the Arkansas Central Railway Company, either in conjunction with third persons or by themselves, clothe themselves with an invulnerable title to said railroad property as against appellants, by obtaining a foreclosure of the property under the mortgage, executed to the Union Trust Company, and having one of their own number appointed receiver, and then purchasing the same at a nominal or wholly inadequate price, in which purchase the receiver was interested; when they still retain said property, and are operating it simply under a new name?

BRIEF.

The bonds held by the appellant, and others of the same class of bondholders, were issued by the State of Arkansas to the Arkansas Central Railway Company in the sum of thirteen hundred and fifty thousand dollars. And this case may in its present form be treated as a test case to determine the status of said bondholders, especially the appellant, as against the appellees.

I.

(*a*) The first proposition suggested by the record, of which an abstract has just been given, is: What was the effect of the legislation of the State of Arkansas, relating to said bonds, without reference to the guaranty by the railway company?

Although this legislation was in part considered by this honorable court in the case of *Tompkins v. Little Rock and Fort Smith Railway*, *125 U. S.*, *109*, most of the questions raised in the brief in this case seem not to have been considered in that.

The first act which was passed by the legislature of Arkansas was enacted on the 18th day of March, 1867, and appears on pages 428 to 432 of the session laws of that State for the years 1866 and 1867.

After providing a method for procuring the aid of the State, in the way of its bonds, (sections 1 to 4 inclusive), this act provides, in section 5—

"That the receipt of any railroad company, for the bonds loaned to it by the State, shall immediately operate as a lien upon the road, its rights, franchises, and all its property of every description, real and personal; and this lien shall be a mortgage on all the property, rights, and credits of the road; and shall have priority over any and all other debts, contracts, or liabilities, of said road; and said mortgage shall continue until the entire amount loaned to the said road by the State shall have been paid off."

Provision is made in succeeding sections for setting aside receipts to pay the interest of said bonds, and to provide a sinking fund for their ultimate redemption (Section 6); and a failure to comply therewith authorized the appointment of a receiver, and, in the last alternative (if the receipts were not sufficient), the sale of the property of the company. (Sections 7 to 10 inclusive).

Later, another act was passed entitled "An act to aid in the construction of railroads," which was approved July 21, 1868. (See Acts 1868, pp. 148–153 inclusive). This act, after pointing out a mode for securing the issuance of the aid bonds, corresponding in many respects with the act of 1867, went on to provide as follows:

Section 6. * * * "The president of such railroad company shall file his official receipt for

each issue of bonds, accompanied by the affidavit of himself and at least four directors, that the bonds, or the avails of them, shall be disposed of solely for the purpose of ironing, equipping, building and completing said road."

Section 7 provided: "That the legislature shall from time to time impose upon each railroad company, to which bonds shall have been issued, a tax equal to the amount of the annual interest upon such bonds then outstanding and unpaid, which tax may be paid in money or the past due coupons of the State at par, and after the expiration of five years from the completion of said road, the legislature shall impose an additional special tax of two and one-half per cent per annum upon the whole amount of State aid granted to such company, payable in money or in the bonds and coupons of the State at par; and, if in money, the same shall be invested by the treasurer of the State in the bonds of the State at their current market value." Provision is then made for continuing this taxing process and for paying the debt in full by the company.

Section 8 provided that in case of default in the payment of taxes as provided in Section 7, that "it shall be the duty of the treasurer of the State, by writ of sequestration, to seize and take possession of the income and resources of said company until the amount of said defaults shall be fully paid up

and satisfied, with costs of sequestration, after which said Treasurer shall release the further revenues of said company to its proper officers."

Reference ought to be made to one other section of this act, bearing, as it does, upon the question of repeal of the act of March 18, 1867.

The section referred to, is the last one in the act, is numbered 12, and reads as follows: "That at the next general election to be holden under the provisions of Section 3 of Article 15 of the Constitution of this State, the proper officers having charge of such election shall, upon a poll, as in other cases, take and receive the ballots of the electors qualified to vote for officers at such election for and against this act, in compliance with Section 6 of Article 10 of the Constitution; such ballot to contain the words 'For Railroads' or 'Against Railroads,' *and if it appears that a majority so voting have voted 'For Railroads,' this act shall immediately become operative and have full force*, and all laws heretofore passed for loaning the credit of this State in aid of railroads shall cease and be void; *but if a majority shall be found to have voted 'Against Railroads,' this act shall be void and of no effect.*" *

Another act was passed on April 10, 1869, which provided for an official mode of ascertaining and

* The italics are our own.

giving notice of default of each company, which obtained the bonds referred to; and Section 3 of the Act provided "That if, after the expiration of sixty days after said tax shall become due and payable, and said railroad company shall have been notified by the Treasurer, as aforesaid, and fail to make full payment, as in said notice required, it shall be the duty of the State Treasurer, through the Attorney General, to make and file a petition, under the seal of the Treasurer's office, in the Pulaski Chancery Court, setting forth the amount due and the fact of said default, praying the issue of the writ of sequestration contemplated in said act, and the appointment of a receiver, to be named in said petition, to receive in his behalf the revenue and income of said company for the purpose specified in said act" [that is the act of July 21, 1868], etc.

By the terms of the next section (Section 4), provision was made for the delivery of possession of all income and revenues of said road and for enforcing a discovery and a recovery thereof.

The acts of 1868 and 1869 are couched in language sufficiently explicit to indicate that the income and revenues of the companies obtaining the State aid were to stand pledged for the payment of such bonds. The lien or charge thus contemplated was to take effect on default or failure of the aided

companies in meeting their annual payments (or so-called tax) to the State on account of the bonds issued to them; and all persons were put upon notice by the terms of said acts that such lien or charge attached to the revenues and income and constituted a security for the interest and principal evidenced by the aid bonds.

To argue (as was done in the Tompkins case) that because the State of Arkansas might have a lien secured to it under certain sections of its revenue laws, that a lien existed under the acts referred to, was, we contend, both uncalled-for and misleading. It was utterly immaterial waether the interest and principal of the bonds were to be paid in the form of so-called taxes or out of operating receipts or borrowed money. *The failure to* provide for the payment of the bonded indebtedness was the circumstance which inaugurated the existence of a *charge* upon the income and revenues of the railroad company. There might be some question as to whether revenues or receipts already earned and expended by the railroad companies could be recovered, in analogy to the doctrine relating to mortgages upon income (although as to this proposition the act of 1869 is certainly in favor of the bondholders); but there can be none as to future income.

The object of the acts, if this income was not to be chargeable for the protection of the State's lia-

bility, would be entirely frustrated. Any other line of construction would simply put it in the power of any of the aided railroad companies, immediately after receiving such bonds, by transfer under bond-mortgage executed to third persons, to prevent the State from recovering a farthing of its debt. Construing the two acts together, it was perfectly clear that the income and revenues of the given railroad were to be bound until the bonds were paid, and not until the road changed hands. It was possible for the road to have changed hands the next day after the bonds were executed.

The question now discussed is not whether third persons would be bound by an unrecorded equitable mortgage upon future income and revenues; but whether under an act of the legislature, which has stronger force than a mere equitable mortgage, the charge therein contemplated shall be placed in a class inferior to an ordinary equitable mortgage. In the case of *The White Water Valley Company v. Vallette*, *21 Howard*, *414*, this court construed the following recital in certain bonds as giving a lien or charge: "These bonds shall have a preference over all debts to be thereafter contracted; that in default of the payment of interest, the holder of the bonds might enter into possession of the tolls, water rents and other incomes of the company; and might apply to any court of the State

(Federal or State) for the appointment of a receiver," etc. (*Id.*, 421). The insolvency of the company was alleged and the question arose upon the action of the court below in taking control of the property for the purpose of collecting its tolls and receipts. The provision relating to tolls and other income was treated as an equitable mortgage relating to future income. It is true that the questions in that case arose between the bondholder and the company; but that cannot matter in this case if the acts were valid, because third persons were as much bound by the acts as by an equitable mortgage of which they had notice.

We venture to submit again, with great deference, that there is no sound distinction between the law involved in the Ketchum case and the acts of 1868 and 1869 involved herein. The mere fact that a commissioner had been designated to take custody of a particular part of the revenues of the railroad company, and to this end possession of the company's property, was emphasized as tending to establish a lien in the Ketchum case, while the absence of these features in the Arkansas law was treated in the Tompkins case as providing no lien. The court in the Tompkins case was not reminded that a statutory charge is equivalent to actual possession, if actual possession would have been necessary to give a lien if there had been no such statute.

See—

Beale v. White, 94 U. S., 382, 386.

And compare—

Hansell v. Harrison, 105 U. S., 401.

Greson v. Morris, 96 U. S., 619.

The acts would have been so construed irrespective of the feature of possession. Indeed, the mere fact that possession was provided for could not have been material in determining whether there was a charge under the statute.

Neither was there any absence of definiteness in the Arkansas acts in designating what was reachable. In fact, this court has frequently had mortgages charging "incomes" before it, and has never hesitated to enforce them against incomes on this account. Perhaps there was a somewhat more limited range or scope given to the commissioner in the Ketchum case, in protecting the State of Missouri, than was accorded the Treasurer and the Attorney General and the Pulaski Chancery Court in protecting the State of Arkansas by the acts of 1868 and 1869. But a conveyance hardly changes its character, or loses its effect, because it embraces a large and indefinite mass of property rather than specific articles.

A deed or conveyance conveying all the property a man has, wherever situated, will surely bind all persons with notice.

Devlin, Deeds, Vol. 2, sec. 1013.

Wilson v. Boyce, 92 U. S., 320.

Ellis v. Martin, 60 Ala., 394.

Vammer v. State, 78 Ala. 28.

Smith v. Fields, 79 Ala., 335.

Johnson v. Grissard, 51 Ark., 410, 413.

Henderson v. Gates, 52 id., 371.

And this is more general and vague than to convey income and revenue of a railroad. So that the mere comprehensiveness of the words could not deprive the acts of the quality of a charge or lien upon property therein referred to.

The agreement which creates a charge upon property of any description, which is capable of ascertainment, no matter how comprehensive in terms, is in equity an effectual lien, even as against future acquisition.

Compare authorities already cited with—

Pomeroy, Eq. Jur., Vol. 1 (1st ed.), sec. 167. Vol. 3 (1st ed.), Chap. VII, Subd. 2, secs. 1235, 1236, 1237.

Jones, Chattel Mortgages, sec. 173.

We need not illustrate the principle further than to quote from Mr. Pomeroy:

"The intent to give a security being clear, equity will treat the instrument as an executory agreement for such security," (citing numerous cases). And he continues: "An assignment of the rents and profits of land as security for a debt, is another mode of creating an equitable lien on the land in favor of the assignee," etc.

Pomeroy, Eq. Jur., Vol. 3, sec. 1237.

It is noteworthy that in the delivery of deeds, the expression of a wish by a donor that certain debts be paid out of funds of a given class, and other directions as vague and informal, have been construed to amount to equitable liens, charges or mortgages as to such property; and this primarily upon the ground that recourse was given in such cases, for conscience sake, to the adaptable remedies of chancery courts. In the acts of 1868 and 1869, the remedy, by way of resort to chancery, is clearly given. Why, then, should not the creation of this remedy, the pointing out of this mode of redress, entitle the State or the holders of the bonds, by way of subrogation, to the character of an equitable charge or lien as a security for the bonds? The recourse to chancery, for conscience sake, being the basis upon which charges upon property are made

equitable liens, it would follow that under the terms of the acts in question—that is, the acts of 1868 and 1869—the effect must be to invest the State, and, by subrogation, the holders of the bonds, with an equitable lien.

In the case of *Tompkins* v. *R. R. Co.*, the point was not made by counsel for the appellant that, irrespective of the question whether the charge contemplated by the act of 1869 was a tax with a lien, such charge taken by itself was an equitable lien. The point seems to have been altogether ignored.

(*b*) Another point failed to be considered in that case. Appellant's counsel in the Tompkins case was so confident in his belief that this court would hold the decision of the Supreme Court of Arkansas in the case of the *State* v. *Little Rock, Mississippi River and Texas Ry. Co., 31 Ark., 701*, to be erroneous, and not the law, that he overlooked the fact that the said decision had in fact been sustained by this court.

In the case referred to the Supreme Court of Arkansas, *inter alia*, held two propositions:

1. That the act of July 21, 1868, was not read three times on three several days, in the two houses of the legislature, as required by the provisions of the Constitution, and that for this reason the act was void.

Cf. 31 Ark. 716–718.

2. That if the act was valid, it never took effect because the vote of the people in favor of the act was had before the act took effect under the Constitution of Arkansas, and none has been since taken.

Cf. 31 Ark. 711-718.

The decision of the highest court of the State in reference to the constitutionality of a statute thereof is followed by this court.

Bank v. *Ottawa*, *105 U. S.*, *667.*

R. R. Co. v. *Georgia*, *98 U. S.*, *359.*

Leavenworth Co. v. *Barnes*, *94 U. S.*, *70.*

South Ottawa v. *Perkins*, *Id*, *260.*

Gut v. *Minnesota*, *9 Wall*, *35.*

Bank v. *Dudley*, *2 Peters*, *492.*

East Hartford v. *Hartford Bridge*, *10 How.*, *511.*

Elmwood v. *Marcy*, *92 U. S.*, *289.*

And while the opinion of the Supreme Court in the Tompkins case may, we assume, have to be deferred to and treated as bearing upon this case, yet so impressed are we with the force and merit of our contention that we have been persuaded to urge our views notwithstanding the same.

Operation and Effect of the Act of March 18, 1867.

The views of the Arkansas Supreme Court regarding the unconstitutionality of the act of July 21, 1868, are sustained by numerous adjudged cases, including some which have arisen in this honorable court.

See,

Ottawa v. *Perkins*, 94 *U. S.*, 260.

Walnut v. *Wade*, 103 *U. S.*, 683, 689.

Spangler v. *Jacoby*, 14 *Ill.*, 299.

English v. *Oliver*, 28 *Ark.*, 320.

Such being the situation in regard to the legislation of 1868, what effect has the act of March 18, 1867? In other words, is not the act of March 18, 1867, still in force, and are not the bonds held by plaintiff in error a valid and subsisting lien under the terms of this act?

That an unconstitutional act, or an act which never in fact takes effect, does not affect a prior act, whose repeal depends upon the effectuation of the later act, is too well settled to admit of serious controversy.

Shephardson v. *R. R. Co.*, 6 *Wis.*, 605.

State v. *Burton*, 11 *Wis.*, 50.

Tims v. *State*, *26 Ala.*, *165*.

Sullivan v. *Adams*, *3 Gray*, *476*.

Devoy v. *Mayor*, *35 Barb.*, *264*.

Devoy v. *Mayor*, *36 N. Y.*, *449*.

Campan v. *Detroit*, *14 Mich.*, *276*.

Childs v. *Shower*, *18 Iowa*, *261*.

State v. *Blend*, *23 N. E. Rep.*, *511*.

S. C., *121 Ind.*, *514*.

In re Rafferty, *25 Pac. Rep.*, *465*.

S. C., *1 Wash. St.*, *382*.

State v. *Hallock*, *14 Nev.*, *202*.

Harbeck v. *New York*, *10 Bosw.*, *N. Y.*, *366*.

Bishop, *Written Law*, *sec. 34*.

Cooley, *Cons. Lim.*, *186*.

In stating the doctrine in the above proposition, the most extreme cases are embraced. Some of the authorities, as well as Mr. Bishop, countenance a more liberal doctrine than we need invoke. They justify the statement that a repealing clause in an unconstitutional act, no matter how independently it stands in the act, is of no effect. That must indeed be so where the *whole act* is of no effect because it was passed in disregard of mandatory con-

stitutional provisions, or never took effect because the vote of the people which was contemplated by the act before it should operate, was never obtained.

Furthermore, the authorities unite in holding that an unconstitutional amendment cannot have the effect of repealing by mere implication the original act.

Exp. Davis, 21 Fed. Rep., 396.

State v. *Alexander, 9 Ind. 337.*

And that a repeal of all laws inconsistent with a statute does not affect laws inconsistent with such parts thereof as are themselves unconstitutional and void.

Devoy v. *N. Y., 35 Barb., (N. Y.), 264.*

Harbeck v. *N. Y., 10 Bosw., (N. Y.), 366.*

Sullivan v. *Andrews, 3 Gray, (Mass.), 476.*

And Mr. Endlich, in his treatise on the Interpretation of Statutes, declares the rule to be that no repeal by implication can result from a provision in a subsequent statute when that provision is itself devoid of constitutional force. Sec. 192.

In determining the rights and obligations of parties litigant under a given state of case, courts will be guided and controlled by the *law as they find it*. They never stop to inquire what law the parties, in their dealings, may have had in mind,

for that is not a matter of election. Personal motives are among the non-essentials in this respect; they serve only one purpose, so far as courts are concerned, and that is to ascertain simply the *facts* which go to define the relative status of the parties.

In *Payne* v. *Conner et al*, *3 Bibb*, (*Ky.*), *180*, it was contended that the remedy pursued and the power exercised by the lower court in awarding relief, were by virtue of an act which had been repealed. The court, after carefully examining the repealing statute, found that it was not sufficiently broad and comprehensive in its terms to affect the act under which the proceedings were had, and that the rights of the parties were properly settled thereby.

This court, in *Brown* v. *Barry*, *3 Dall.*, *365*, where the question arose whether a certain bill of exchange was enforceable, proceeded to inquire into the state of the law in existence at its date; and it found that while repealing legislation affecting the same had previously taken place, that such repealing legislation had not in fact become operative until after said bill of exchange had been drawn, and that its validity was, therefore, not impaired thereby.

A marked instance of the disposition of courts to locate and apply the *law in force* at the happen-

ing of events in controversy, is found in *Phillips* v. *Hopewood*, *10 B. & C.*, *39*. In that case it appeared that in March, 1825, a trader committed an act of bankruptcy, upon which a commission might have issued under the statutes relating to bankruptcy then in force; on the 1st of May those statutes were repealed; on the 2nd of May the repealing act was repealed, and the former acts thereby revived. In July a commission of bankruptcy issued: Held, that it was supported by the act of bankruptcy committed in March.

Mr. Bishop, in his publication on the Written Law, expresses the rule correctly when he says, that there is a sense in which, in the nature of things, no legislation is or can be other than prospective. (sec. 83). And that in the consideration of the rights of persons, the law in all its parts and all acts, though made at different times, and the common law touching the same matter, must be taken together. (sec. 82.)

But the act of July 21, 1868, is perfectly clear, even if there were no decision upon this subject.

As already quoted, it will be observed that the last section of that act says: "And if it appears that a majority so voting have voted 'For Railroads,' this act shall immediately become operative and have full force, and all laws heretofore passed for loaning the credit of this State in aid of rail-

roads shall cease and be void, but if a majority shall be found to have voted 'Against Railroads,' this act shall be void and of no effect."

This language places out of the region of debate two propositions: (1) that the repeal of previous legislation was not to take effect if the act itself did not take effect pursuant to a vote of the people; (2) that if the act was unconstitutional because not read on three separate days, as required by the Constitution, then the repealing part of it could not take effect.

The circumstances under which the act of July 21, 1868, was passed are so fully detailed in the case in 31 Arkansas, 711–718, that it is needless to encumber this brief with a recital thereof. This court, the same as the Supreme Court of Arkansas, will take judicial notice of the journals of the two houses of the General Assembly of the State of Arkansas.

South Ottawa v. *Perkins*, *94 U. S.*, *260*.

Walnut v. *Wade*, *103 U. S.*, *683*, *689*.

Gardner v. *Collector*, *6 Wall.*, *499*.

Bank v. *Ottawa*, *105 U. S.*, *667*.

The act of March 18, 1867, was, therefore, in force when the bonds here in suit were issued and used by the Arkansas Central Railway Company.

It is still in force. And the mere false recital in the bonds, when the act was not in force, was of no effect. *Falsa demonstratio non nocet.*

Wharton, Contracts, Vol. 2, secs. 668, 672.

Elphinstone, Interpretation of Deeds, p. 157, seq.

Devlin, Deeds, sec. 999.

Endlich, Interpretation of Statutes, sec. 302.

The rule is well known that the improper reference to an act in any pleading, even under the strict discipline of the early English law courts, did not vitiate the pleading, but was treated as surplusage. And a more liberal doctrine always applied to contracts and conveyances. ~~We have found no case which determines the effect of an erroneous or improper reference to existing legislation in negotiable paper~~. ~~But~~ Our research has shown that the courts go to the extremest lengths to save instruments from being avoided.

And they have never departed from this ancient rule of construction: "Whenever the words of a deed, or of the parties without deed, may have a double intendment, and one standeth with law and right and the other is wrongful and against law, *the intendment that standeth with law shall be taken.*" (Coke's Litt., 42.).

The best illustration of the law is the course of decisions regarding statutory bonds, where the form is prescribed. In reference to these the rule now firmly established is, that if the bond contains enough upon its face to satisfy the statute, it will not be avoided because there are other recitals which the law does not contemplate.

U. S. v. ———, *1 Brock., 195, op. by Marshall, C. J.*

U. S. v. *Brown, Gilpin, 155, (a well considered opinion by Hopkinson, J.).*

Shunk v. *Miller, 5 Barr, (Pa.), 250.*

Walker v. *Chapman, 22 Ala., 116, 124.*

Howie v. *State, 1 Ala., (N. S.) 113.*

Hall v. *Cushing, 9 Pick., 395, 404.*

Harper v. *Rowe, 55 Cal., 132.*

Bishop, Contracts (Ed. 1887), sec. 443.

And the doctrine is as applicable to false references to statutes in negotiable bonds, as to other forms of contract.

Commissioners v. *January, 94 U. S., 202, 205.*

Anderson Co. v. *Beal, 113 U. S., 227, 238.*

In the case of *Commissioners etc.*, v. *January*, *supra*, the new act, which was in force and had to be conformed to at the time the negotiable bonds there in question were issued, was not recited in the bonds, but the prior act, which had been repealed, was recited, and the prior act so repealed had been mostly kept in view in taking steps toward the issuance of said bonds; yet, even under such a state of facts, this court disregarded the reference to the earlier act, and enforced the bonds under the law then in force; going so far as to apply the doctrine of estoppel the same as if the later act had been properly recited. The court there, *inter alia*, said:

"The bonds recite that they were issued in conformity to law, and in pursuance of the election held on the 6th of April, 1869. It is true they refer to the wrong statute, but *falsa demonstratio non nocet*. The bad here does not hurt the good."

In *Anderson Co.* v. *Beal*, *supra*, it was, among other things, said:

"The bond recites the wrong act, but if that part of the recital be rejected there remains the statement, that the bond 'is executed and issued in pursuance to the vote of the electors of Anderson county, of September 13, 1869.'" And the bonds in that case were enforced under the general laws, without reference to the special act referred to in the bonds.

The laws of Arkansas prescribed no particular form for the bonds or coupons here in suit. It was not necessary for them to recite any particular act, nor to assume any particular form. So long as they retained the words of negotiability, sufficient was preserved to give them effect as negotiable paper.

Thus it has been held that the insertion in a negotiable instrument of an illegal clause for attorney's fees, would simply annul this clause, but not impair the negotiability of the instrument.

Meyer v. *Hart*, *40 Mich.*, *517*.

Bullock v. *Taylor*, *39 Mich.*, *138*.

Gaar v. *Banking Co.*, *11 Bush.*, *182*.

Witherspoon v. *Musselman*, *14 Bush.*, *814*.

We insist that in point of law the appellant may legitimately assert his rights under the act of 1867.

This being true, the sufficiency of his complaint in this court can no longer be questioned. For he then presents a case which this court has said entitles him to relief. Thus, in passing upon the effect of the act of March 18, 1867, this court said in the case of *Tompkins* v. *R. R. Co.* (*125 U. S.*, *p. 127*), that there was a plain and simple way to give a lien, and "That way had been adopted by the State in a statute passed March 18, 1867, and it

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sion Acts of 1868.]

The decisions in the
Anderson Co. v. Beal, 113
and *Commissioners v. Ja*
U. S. 202, heretofore cited
this contention.

was the way usually adopted by other States when granting similar aid to their own companies." And this court treated a similar act in *Schutte* v. *R. R. Co.* as giving a lien.

II.

Effect of the Company's Guaranty.

There is one striking feature which distinguishes this case from the Tompkins case and the Ketchum case,—here the primary liability was contemplated as being in the railroad company; in any event it was personally bound under an explicit guaranty. In this respect it resembles the case of *R. R. Co.* v. *Schutte*, *103 U. S., 118*. And the doctrines of that case are clearly applicable here in support of the rights of the holders of the bonds in this case.

The company, in virtue of its guaranty, was estopped to question the validity of these bonds.

103 U. S., pp. 139, 140.

And under the decision in that case we became subrogated to the State's rights as against any security which it might have access to for the payment of the bonds. Indeed, that decision goes still further, for it holds the security to be a primary fund for the satisfaction of the bonds.

Cf. 103 U. S., p. 142.

See further Sheldon, Subrogation, sec. 167 where it is said:

"A creditor may also be substituted to the claim of his debtor for reimbursement upon one who is under no immediate liability to the creditor, where the latter is the party upon whom the burden of the debt ought ultimately to fall."

But there is another way of stating the law. The right to enforce security, given for the payment of negotiable paper, will pass to all holders of the said paper, pending maturity, even though the security has not been formally transferred or delivered.

Carpenter v. *Longan*, *16 Wallace*, *271*.

American File Co. v. *Garrett*, *110 U. S.*, *288*, *294*.

Pierce v. *Faunce*, *47 Me.*, *507*.

Sprague v. *Graham*, *29 Me.*, *160*.

Taylor v. *Page*, *6 Allen*, *86*.

Breen v. *Seward*, *11 Gray (Mass.)*, *118*.

Green v. *Hart*, *1 Johns*, *580*.

Jackson v. *Blodgett*, *5 Cow.*, *202*.

Bloomer v. *Henderson*, *8 Mich.*, *395*.

Judge v. *Vogel*, *38 Mich.*, *568*.

Cornell v. *Hickens*, *11 Wis.*, *353*.

Croft v. *Bunster.*, *9 Wis.*, *503*.

Sheldon, *Subrogation*, *sec. 185*.

The recital of an unconstitutional act in the bonds could of itself have no effect.

Lippincott v. *Pana*, *92 Ill.*, *34*.

School Dist. v. *Stone*, *106 U. S.*, *183*.

But the liability of the railroad company, sustained by its guaranty and its use of the bonds, was equal to imposing an obligation under valid and existing laws.

R. R. Co. v. *Schutte*, *supra*.

So that upon sound principles of law, outside of any peculiar equities growing out of the facts of this case, the complainant in error is entitled to a reversal.

State Not a Necessary Party.

Nor was the State a necessary party to the litigation. The bill recites a repudiation of the debt by the State and its refusal to proceed further in regard thereto. And the mere fact that the State might choose to assert some interest would not oust the court of jurisdiction.

U. S. v. *Peters*, *5 Cranch.*, *115*.

The State not being liable, we had a right to proceed against the railroad company.

Schutte v. *R. R.*, *103 U. S.*, *118*.

R. R. Co. v. *Howard*, *7 Wall.*, *392*.

Estopped From Denying Validity by its Guaranty.

Inasmuch as the Arkansas Central Railway Company was estopped by its guaranty to question the validity of the bonds, and inasmuch as it agreed "on default of the State of Arkansas to pay the principal or interest of the bonds or either as the same shall become due," * * * "to pay the same to the holder," etc. (see Record 4), it cannot say that the bonds and coupons were not valid under the act of 1867, no matter what the recitals of the bonds were—and although they might on their face have referred to an act that never had taken effect. The railway company, by sending out the bonds, with its guaranty, proclaimed that they were duly and properly issued, under a valid law, and that if the State did not pay them it would do so immediately upon the State's default.

III.

The Present Owners Answerable as Trustees.

There is still another phase of this case which was absent in either the Tompkins, Ketchum or Schutte cases.

It is alleged in the bill, and conceded by the demurrer, that the Arkansas Central Railway Company, through its officers and directors, made oath as required by the acts of Arkansas, that the company had performed the conditions which were prerequisites to its obtaining the aid bonds, among which were those in suit. This then is an admission that they did the work and put in the material to justify an issue of $1,350,000 of bonds. It is likewise alleged and conceded, that two other sets of bonds were issued, one to the amount of $1,400,000, of which $720,000 were utilized, and the other to the amount of $480,000, making a total of $2,550,000. The bill shows, with sufficient detail, that after all of this had been done, a suit was instituted, ostensibly in behalf of the Union Trust Company, on the mortgage which covered the $720,000; that in said suit the bonds issued by the State to the company, were mentioned and recited as an existing obligation, but the State was not, and could not be, made a party defendant, was not represented, and besides none of the holders of said bonds were represented or made parties thereto. That the said suit was brought at the procurement of A. H. Johnson, who at the time was the president of the said railroad company; that said Johnson was appointed receiver therein and acted as such for a long time, and was then nominally replaced as such receiver by one W. W. Bailey, while he in fact continued to discharge

the duties and to draw the pay as such receiver; that the said cause went to a decree by default; that a sale was had under it, and that the entire property of the railroad company, comprising forty-eight miles of railroad, were bought in at said sale by one S. H. Horner, as trustee, for $40,000; that in order to enable said Johnson to secure control of said road, he caused said Bailey, while acting as receiver, to employ him as superintendent thereof, for which he (Johnson) was separately paid, and also to give him certain contracts, whereby he managed to become the holder and owner of receiver's certificates to a large amount, which were a lien on said road superior to said mortgage bonds; that immediately after the sale the said Johnson and S. H. Horner and the brother of said S. H. Horner, to-wit, J. J. Horner, who had previously been the attorney of the said Union Trust Company, formed a new company, which they called the Arkansas Midland R. R. Company, of which said Johnson was made president, said John J. Horner was made vice-president and said S. H. Horner was made secretary; that thereupon said S. H. Horner transferred the railroad property, bid in by him, for the pretended and fictitious consideration of $600,000 to said company, when in fact nothing passed. It is alleged and conceded, that the said J. J. Horner had been and was at the time of said sale, purchase, and formation of said new railroad company, and the transfer by S.

H. Horner, an officer and director of the Arkansas Central Railway Company, and that said S. H. Horner knew all of these matters as well as of the issue of the bonds here in suit. An exhibit discloses the sale of Johnson's half interest in said railroad to the two Horners, together with a one-fourth interest in a wharf and shipping business at Helena, of little value, for the sum of $100,000 soon after the transfer of the railroad property from S. H. Horner to the Arkansas Midland R. R. Co. as above stated. It is admitted that the plaintiff is one of the bondholders of said issue of State aid bonds and that the Arkansas Central Railway Company was made insolvent by the said acts of its said officers. The bill, with these allegations, shows that the appellant was, among other things, seeking to have his accruing rights upon coupons that were maturing from time to time protected and enforced by means of the property which had been gobbled up by the officers and directors of the company, which negotiated them.

The adroit and audacious manner in which this property was raided and corralled by those who were entrusted with its management, invites special notice and consideration. In fact, the allegations show that the enterprise was undertaken solely for wreckage and private gain, and from this standpoint may be looked upon as perfectly unique and

unapproachable. It is impossible amid the whole stock of cases relating to the manipulation of railroad property by officers and directors to hit upon a single one which combines so many of the worst elements of wrong, corrupt intrigueing and fraud, and which inflicted greater hardship and injustice upon innocent parties involved therein.

And to say that, in the face of it all, a creditor of the corporation, as his demand matures, may not have redress under such circumstances, is really to cast reproach upon our jurisprudence.

The question under this state of facts is not what may be due any mortgage bond-holders, or what the status of such bond-holders may be. The Union Trust Company was never a necessary party to this suit except to determine the priority of liens. The question is solely between the appellant on the one side and the Arkansas Central Railway Company and the Arkansas Midland Railroad Company on the other. And in arraying the adversary parties in this form it should be remembered that these two railroad companies are, according to the bill and as admitted by the demurrer, one and the same. (Record, p. 11).

And thus arrayed the issue now presented is whether the officers and directors of the Arkansas Central Railway Company and their knowing asso-

ciates can secure the benefit of an investment involving over two millions of dollars in bond indebtedness for the nominal sum of $40,000, which $40,000 these same directors and officers had raised by corrupt scheming in the shape of salary and contracts at the expense of the bond creditors? The value of the property is charged as having been, at the date of filing the bill herein, "upwards of four hundred thousand dollars,"—it represented at least a million, three hundred and fifty thousand according to the oath that had to be made to get the bonds issued by the State. And this property, after purchase by the officers and directors, was put into a corporation capitalized at $250,000.

In the case of *Drury* v. *Cross*, 7 *Wall.*, 299, a railroad plant was sold at a sum much below its value to a third person, in no way connected with the railroad company, to save the directors from personal liability. The facts in that case are in many respects similar to this. The third person there invested means to save himself from loss as a creditor of the corporation, in making the purchase of the railroad plant. The sale was set aside and the purchaser was decreed to be a trustee for the creditors who had been defrauded.

In *Jackson* v. *Ludeling*, 21 *Wall.*, 616, the head note states the proposition of law decided upon the point under discussion in the following form:

"'The managers and officers of a company where capital is contributed in shares, are in a very legitimate sense trustees, alike for its stockholders *and its creditors*, though they may not be trustees technically and in form. They accordingly have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Contrarywise, in case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge, the highest possible price for the property which can be obtained for it."

In that case a bondholder confederated with some of the directors of the railroad company, and obtained the property of the company at an inadequate value, at the expense of other bondholders. And the court said: "The defendants can take nothing from such a sale thus made. Were we to sustain it, we would sanction a great moral and legal wrong, give encouragement to faithlessness to trusts and confidence reposed, and countenance combinations to wrest by forms of law from the uninformed and cofiding their just rights."

Where the directors of a company directly or indirectly, whether in person or through the agency of third persons, enter into transactions for their own benefit at the expense of the corporation, it will not be enforced.

See, beside the cases already cited,

McGourkey v. *R. R. Co.*, *146 U. S.*, *536*, *552*.

Richardson v. *Green*, *133 U. S.*, *30*.

R. R. v. *Howard*, *74 U. S.*, *392*.

Hoyle v. *R. R.*, *54 N. Y.*, *314*.

Jones v. *Arkansas, etc., Co.*, *38 Ark.*, *17*.

Cook, Stock and Stockholders, *sec. 653*.

San Francisco v. *R. R. Co.*, *48 Cal.*, *398*.

Bretts v. *Woods*, *37 N. Y.*, *317*.

Ogden v. *Murray*, *39 N. Y.*, *207*.

Mason v. *Pavabic Mining Co.*, *25 Fed. R.*, *882*.

In the case of *Jones* v. *Arkansas, etc., Co.*, *supra*, the Supreme Court of Arkansas converted the purchaser of the property of an insolvent corporation, at the suit of creditors, into a trustee for the benefit of said creditors, although it was proved that the purchase money went to pay corporate debts. The facts there disclosed that the purchaser

was a director and he and other parties had formed a new corporation to whom the property was turned over; that the purchase price had been furnished by said parties who formed said new corporation, and that the property had been purchased at an inadequate value.

A review of that case will show that it had none of the strong features of fraud which characterize this case. The court, in the course of its opinion, said:

"Now, it is quite plain that Weeks was not a *bona fide* purchaser, without notice of the trust. As a director, he is conclusively presumed to know the pecuniary condition of his company." * * (p. 25). The circumstances attending the purchase were then summed up and commented upon. And the court continued: "Indeed, there is some doubt whether, being a trustee for stockholders and creditors, he could buy at all. It is laid down in some of the text books, and in some adjudged cases, that such a purchase is absolutely void without regard to the good faith of the transaction, and that the property belongs to the corporation the same as it did before such sale.* The better opinion, however, is, that it is only to be avoided at the instance of some party in interest. * * * And such we un-

*Here the fact that the two corporations are in fact one and the same is conceded.

derstand to be the rule indicated by this court in an analogous class of cases."

Cook, in his recent work on Stockholders, states the law as follows:

"One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation directly or indirectly or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much or more than the property is worth."

"Similar rules," he says, "prevail in regard to a director's purchases of corporate property at a foreclosure sale thereof. He cannot be a purchaser, either directly or indirectly, at the foreclosure sale. This is the rule, whether the foreclosure is instituted by those interested in the corporation or by third parties."

Cook, Stock and Stockholders, sec. 653.

The references cited to sustain the text in Cook, show a variety of cases, some where third persons had acted for themselves and the directors in the purchase of the property, and others where the purchasers, including officers and directors of the defrauded corporation, had organized a new corporation to whom the property had been transferred after purchase.

The law is thus pointedly laid down by Mr. Rorer (Railroads, vol. 1, 214.):

"Any action of the directors tending to their or any of their advantage at the expense of or to the detriment of the company or creditors of the company, whether the same be done by direct means or indirectly through collusive litigation or judicial intervention, will be held void for fraud in equity and will be set aside. And if, by such means or collusive litigation, a railroad be subjected to sale and be sold for a sum less than its real value, the sale will not be held for naught, but the purchaser or purchasers will be held in equity as trustees for those interested as creditors of the company for the full value of the property, deducting such sum, if any, they may have paid for the actual advantage of the company."

It is unnecessary to discuss the complete accuracy of all Mr. Cook or Mr. Rorer have said. In the main, the text of both corresponds with what this court and the Supreme Court of Arkansas have decided. The facts in this case come fully within the inhibition of the law as they have declared it.

That a sale in which the receiver is interested is void is well settled. Indeed here the real receiver was a party to the purchase.

High on Receivers, sec. 193.

Michaud v. *Girod, 4 How., 503.*

APPELLANT'S RIGHT TO MAINTAIN HIS BILL.

The right of McKittrick to bring the bill was not questioned in the court below. In *Jackson* v. *Ludeling*, *21 Wall.*, *616*, the creditors had not reduced their claims to judgment. And in *Case* v. *Beauregard*, *101 U. S.*, *688*, *691*, the views of this court are expressed as follows:

"But, after all, the judgment and fruitless execution are only evidence that his [the creditor's] legal remedies have been exhausted, or that he is without remedy at law. They are not the only means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form. '*Bona sed impossibilia non cogit lex.*' It has been decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference." (citing numerous cases). ' "This is certainly true where the creditor has a lien or a trust in his favor.

"So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of

hindering and delaying creditors, and to subject the property to the payment of the debt due him. (citing authorities.)

"The foundation upon which these and many other similar cases rest is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal process.

"But * * it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies." (citing authorities.) "Indeed, in those cases in which it has been held that obtaining a judgment, and issuing an execution, is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien." But this, the court says, was unessential when a lien or trust already existed.

See also,

Terry v. *Tubman*, *92 U. S.*, *156*, *160*.

That there exist both a lien and a trust in this case is clear. The lien arises under the legislation already referred to, and is as much a basis for main-

taining an equitable suit as were the rights of the mortgage creditors who sought to reach assets fraudulently conveyed in the case in 21st Wallace. But even if this lien were held not to exist, here is an obvious trust, in virtue of which the officers and directors of the Arkansas Central Railway Company are to be compelled, as trustees, to account to the creditors for the property they improperly hold and use to their own personal advantage.

But aside from all this, even if the complainant were a simple bond creditor, he could still bring this bill to compel an accounting for the property so illegally appropriated, because the corporation which is liable has been rendered impotent, propertyless and insolvent, and its officers, as shown in the bill, have abandoned its directory and there is no way of getting service, or a judgment againt it. (See Record, p. 13.)

We are not attempting to enforce the liability of a stockholder, we are simply trying to get at the property of the corporation, which has been fraudulently misappropriated by another corporation through the machinations of its officers and directors.

Cf. Patterson v. *Minnesota Mfg. Co.*, *42 N. W. Rep.*, *926.*

In *Morawetz, Corporations (Ed. 1882), sec. 571*, the law is stated to be:

"The equitable lien of creditors upon the assets of a corporation is subject to a power of management only. The company cannot wilfully destroy the security of its creditors, or appropriate the corporate assets to the use of its shareholders. So long as the officers of a corporation do not exceed the wide discretionary powers to which creditors must be held to have assented, the latter cannot complain; but any waste or misappropriation of the property of a corporation is in violation of the equitable lien of its creditors, and may be restrained by a court of equity, upon general principles of equity jurisprudence." In the succeeding section (sec. 572) he cites authority to show that corporate assets which are being misappropriated, will be put into the hands of receivers at the suit of simple contract creditors.

The authorities on the subject demonstrate that the trust relation of directors to a corporation and its creditors is sufficiently definite to make them and their confederates, whether in the form of a new corporation or otherwise, amenable to the process of a chancery court at the instance of a corporate creditor, whether his claim be in judgment or not.

We submit that upon any one of the propositions contained in this brief we are entitled to the favorable judgment of this honorable court.

Respectfully submitted,

J. ERB,

MORRIS M. COHN,

Of Counsel.

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IN THE

Supreme Court of the United States.

No. 248.

THOS. C. McKITTRICK

vs.

THE ARKANSAS CENTRAL RAILWAY COMPANY, THE ARKANSAS MIDLAND RAILWAY COMPANY, AND THE UNION TRUST COMPANY.

Supplemental Brief for Appellant.

A. No bar of the statute of limitations was pleaded in this case. It should have been pleaded to be available on the part of appellees.

Bump, Fraudulent Conveyances (2d ed.), 545.

Williams *vs.* Banks, 11 Md., 198, 236.

Here no bar could have applied, nor could the equitable doctrine of laches be invoked, because the suit was brought by complainant within a short period after the maturity of his demand herein. Until its maturity, no right of action

accrued to him, and no right to institute suit on the ground of fraud could be brought until that time.

Taylor *vs.* Bowker, 111 U. S., 110.
Hawkins *vs.* Glenn, 131 U. S., 319, 332, 333.
Bover *vs.* Chapman, 119 U. S., 601, 602.
Clark *vs.* Boorman, 18 Wall., 493.
Fogg *vs.* R. R. Co., 17 Fed. Rep., 871.
Bank *vs.* Kinard, 5 S. E., 461; S. C., 28 South Carolina, 101.
Saler *vs.* Chandler, 18 South Carolina, 526.
Evans *vs.* Thornburg, 77 Ind., 106.
Ramsey *vs.* Quillen, 5 Lea (Tenn.), 184.
Bresnahan *vs.* Nugent, 52 N. W. Rep., 735.
Weaver *vs.* Haviland, 68 Hun., 376.
Bump, Fraudulent Conveyances (2d ed.), 547.
Wood, Limitations (2d ed.), vol. 1, pp. 311, 312.

In re Taylor *vs.* Bowker, *supra*, it was held that not before the debt of the complaining creditor has accrued and until he had exhausted his remedy at law by obtaining judgment and execution could he complain of a fraudulent conveyance. While that case is not applicable in Arkansas so far as the obtaining judgment and execution is involved—being in this an application of Maine law, with which the law of Arkansas does not correspond (see Session Acts of Arkansas for 1887, p. 193*)—it is an authority for the posi-

* This law provides "that in suits to set aside fraudulent conveyances and to obtain equitable garnishments it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief."

tion that nothing could be done by the creditor until his debt matured.

See also Fogg *vs.* R. R. Co., *supra*.

See also our former Brief, pp. 62–66.

In the case of Hawkins *vs.* Glenn, *supra*, many years had elapsed between the insolvency of the corporation and the suit for the recovery of unpaid subscriptions to stock therein, and the doctrine of prescription was invoked under the statute of limitations prevailing in the given State. But this Court held that no action having accrued until a call had been made no bar of the statute would begin to run until after that time. And in that case, Mr. Chief Justice Fuller, speaking for the Court, used this significant language as expository of the general principle we invoke: "Statutes of limitation do not commence to run in respect to them [such subscribers] *until the retention of the money has become adverse by a refusal to pay upon due requisition.*" (131 U. S., p. 332.)

And in the case in 18 Wallace, *supra*, the accrual of the action is made a criterion in determining the question as to whether the doctrine of laches was invokable in an attack upon an executor for a fraudulent disposition of assets under a will.

One of the South Carolina cases (which involved a creditor's bill to set aside a fraudulent conveyance) expressly states that the accrual of the action is a prerequisite. Thus it is said there: "In all cases where the statute is pleaded the *first* question to determine is, When did the

right of action accrue? and, *secondly*, Was the party in condition to sue or was he under some legal disability ?"

Bank *vs.* Kinard, 28 S. C., p. 110.

In the case of Evans *vs.* Thornburg, *supra*, the very question now under discussion was involved. There the creditor brought suit to set aside an alleged fraudulent conveyance made by the debtor before the debt had matured, and the defendants relied upon the defense that the suit had been prematurely brought. The court sustained this contention and said:

"Until the note became due no right of action accrued to the plaintiff upon it, and until a right of action accrued to them upon the note they were not authorized to demand that the land conveyed to Mrs. Thornburg [the alleged fraudulent grantee] should be made subject to its payment, conceding the conveyance to her to have been fraudulent as against them."

77 Ind., p. 108.
See also Ramsey *vs.* Quillen, *supra*.

B. "Where the bill consists of a great variety of circumstances, the evidence of which might sustain the relief asked, with some modifications, a demurrer will not properly lie, for it has been said that to sustain a demurrer there must be a neat, short point amounting to an absolute denial of the plaintiffs' title to any relief."

Story, Eq. Plead. (10 ed.), § 528, citing Brooke *vs.* Hewitt, 3 Ves., 253.
And see Story, Eq. Plead., § 40.

Under a prayer for general relief, and without a special prayer, if the relief sought under the general prayer is con-

sistent with the case made by the bill, a sale may be set aside or other relief granted.

Roper *vs.* Sanders, 21 Grat., 60.

Story, Eq. Plead. (10 ed.), § 42, note *a*, and authorities there cited.

A general demurrer to a bill in equity, we submit, must respond to the following test if it is to be sustained: Would a decree giving the relief contended for be open to attack collaterally in awarding such relief?

Respectfully,

J. Erb.

Morris M. Cohn.

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CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THOMAS C. McKITTRICK, *Appellant*,
vs.
The Arkansas Central Railway Company,
The Arkansas Midland Railroad Company,
and The Union Trust Company, } *Appellees.*

No. 248.

Brief for The Arkansas Midland Railroad Company and The Union Trust Company, Appellees.

JOHN J. HORNOR,
Counsel for Arkansas Midland R. R. Co.
and Union Trust Co., *Appellees.*

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Brief for The Arkansas Midland Railroad Company and The Union Trust Company, Appellees.

This is a bill filed by the appellant in the United States Circuit Court for the Eastern District of Arkansas, on January 10, 1883, against the Arkansas Central Railway Company, the Arkansas Midland Railroad Company and the Union Trust Company, to enforce against the Arkansas Midland Railroad Company a lien claimed to be held by the appellant for certain coupons clipped from bonds issued by the State of Arkansas under the Act of July 21, 1868, to aid in constructing the Arkansas Central Railway. A demurrer was interposed by the Arkansas Midland Railroad Company and the Union Trust Company to said bill, which was sustained by the court at the

October term for 1889, the bill dismissed for want of equity and an appeal prayed.

The case of Tompkins vs. the L. R. & F. S. R'y Co. 125 U. S. p. 109. is decisive of all material points in this cause.

The only distinction attempted to be drawn by counsel for appellant was in the guarantee by the Arkansas Central Railway Company endorsed upon the bonds, and which guarantee is to be found at page 4 of the record.

The statutes under which these bonds were issued, the delivery of them to the railroad, and its acceptance thereof, created no lien upon the property of the Arkansas Central Railway Company.

Tompkins vs. L. R. & F. S. R'y Co., *supra*.

The lien must have been created either by the express terms of the statute under which the bonds were issued, and which terms do not appear in the statute, or it must have been created by some form of conveyancing recognized by the laws of Arkansas.

In the light of Tompkins vs. L. R. & F. S. R'y Co. *supra*, it cannot be contended that the statute created such a lien, nor that the terms of the guarantee was such an instrument as under the laws of the State of Arkansas would have the effect of creating any lien upon the property of the company.

The only mode by which the railway company could have charged its property with a lien for the payment of the bonds of the State was by a conveyance of such property acknowledged or proven and filed for record in conformity with chap-

ter 110 Mansfield's Digest of the Statutes of Arkansas, which is as follows:

"Section 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"Sec. 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time when the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

The only effect which can be given to the guarantee is, that it rendered the Arkansas Central Railway Company liable to an action at law upon the non-payment by the State of Arkansas of its bonds. It has the same effect and the same only as if the bond had been endorsed by any other corporation or individual.

JOHN J. HORNOR,
Counsel for Arkansas Midland R. R. Co.
and Union Trust Co., *Appellees.*